R. L. White Company, Inc. *and* Louisville Printing & Graphic Communications Union Local No. 19, International Printing & Graphic Communications Union, AFL-CIO-CLC. Cases 9-CA-15677, 9-CA-15814, 9-CA-15933, 9-CA-16199, 9-CA-16276-1, -2, 9-CA-16298-1, 9-CA-16507, 9-CA-16613, 9-CA-16832-1, -2, and 9-RC-13512

June 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 28, 1982, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

1. The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by instructing employees to vote against the Union through the defacing of a sample Board ballot. Respondent excepts to this finding, contending that Respondent in no way defaced a sample ballot. We find merit in this exception.

The record reveals that on December 11, 1980,[4] Supervisor Terry Harrison showed employees a copy of the sample ballot, and, with his thumb covering the "yes" box, he told them that, when they voted the next day, "we want you to vote 'no,' the company wants you to vote 'no,' I want you to vote 'no.'" We find nothing objectionable or coercive in this conduct.

In order to preserve its "air of impartiality" in elections the Board will not permit a "participant in [an] . . . election . . . to suggest either directly or indirectly to the voters that [the Board] endorses a particular choice." *Allied Electric Products, Inc.*, 109 NLRB 1270, 1271-72 (1954). However, Respondent's conduct here posed no likely danger that employees would believe the Board favored Respondent in the election. Although Respondent's supervisor only showed employees a portion of the ballot, nothing the supervisor said would have misled employees into believing that the only choice on the ballot was to vote against union representation or that the Board had endorsed Respondent. Moreover, as the supervisor's statement to employees was not coupled with any threats of reprisal or other form of coercion, we find the statement to be merely a lawful expression of Respondent's antiunion feelings and not violative of Section 8(a)(1) of the Act. Accordingly, we hereby dismiss this allegation of the complaint.

2. The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by urging employees to revoke their authorization cards. Respondent excepts to this finding contending that its conduct in this regard was not violative of the Act. We find merit in this exception.

[1] Respondent's motion to amend the transcript in reference to the testimony of Shift Manager Joyce Harrison is denied as lacking merit. Respondent's motion to strike the General Counsel's brief in support of exceptions is denied because in view of our findings herein, Respondent has not established that it was prejudicial by the brief's noncompliance with certain technical aspects of our rules.

[2] Respondent and the General Counsel each have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the absence of exceptions we adopt, *pro forma*, the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) of the Act by the supervisors' distribution of antiunion literature in working areas and requiring or encouraging employees to read the literature during their nonbreak working time. Similarly, we adopt, *pro forma*, the Administrative Law Judge's dismissal of the General Counsel's allegation in the complaint that Respondent allowed antiunion employees to distribute literature while prohibiting prounion employees from doing so.

We find it unnecessary to pass on the Administrative Law Judge's finding that Supervisor Steve Smallwood's statement to employee Tammy Barnes in October or November that "he didn't think it would do any good if the union did get in" violated Sec. 8(a)(1) of the Act. As we agree with the Administrative Law Judge's findings that Supervisors Danny Poppelwell and Terry Harrison indicated to employees that selection of the Union as their bargaining representative would be futile, any finding with respect to Smallwood's statement would be cumulative and would not affect the Order herein.

For the reasons stated by the Administrative Law Judge, and in light of the numerous unfair labor practices committed by Respondent during the election campaign, including remarks to employees concerning the futility of selecting the Union as their bargaining representative, we agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(1) by Supervisor Michael McDowell's remarks to employee Tammy Barnes implying that unionization would inevitably lead to strikes and violence. In view of this finding, we find it unnecessary to pass on the issue of whether the remarks of Supervisor John Jones to employee Cheryl McMichael or those of Supervisor Fred Haley to employee Keith Payzor similarly implied the inevitability of strikes as any additional findings would be cumulative and would not affect the Order herein.

[3] To assure a "make-whole" remedy, we shall modify the Administrative Law Judge's Order by providing, *inter alia*, that Respondent expunge from its files any references to the disciplinary warnings given employees Kenneth Browning, Jamie Bibb, and Nancy Fried, to the discharges of Nancy Fried and Sandra Burress, and to the suspension of Jamie Bibb; and that Respondent must notify these employees in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

[4] All dates are in 1980 unless otherwise noted.

At a meeting with employees in December, Respondent's executive vice president, Steven Nelson, distributed a pamphlet containing eight questions and answers, including the following:

> QUESTION: HOW DO I GO ABOUT GETTING MY UNION CARD BACK FROM THE UNION?
>
> ANSWER: Some unions will not return signed authorization cards once they have them. I don't know what Local N-19 would do. If an employee wants the card back, a certified letter can be sent to the union and a copy to the NLRB. Whether or not an employee chooses to try to get an authorization card returned is solely that employee's decision. Here are the addresses for your information:
>
> Local N-19
> IP&GCU
> P. O. Box 1313
> Louisville, KY 40201
>
> National Labor Relations Board
> Region 9
> 3003 Federal Office Building
> 550 Main Street
> Cincinnati, OH 45202

During the course of the meeting Nelson reiterated the information contained in the handbill, explaining to employees that they could have their authorization cards returned to them and how they could accomplish this.

Without commenting on the lawfulness of the language in the handbill and without citing any legal precedent, the Administrative Law Judge concluded that Nelson's remarks violated Section 8(a)(1) because they were made gratuitously and thus necessarily would be interpreted by employees as coercively urging employees to revoke their authorization cards. We disagree. An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance,[5] or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation. *Aircraft Hydro-Forming, Inc.*, 221 NLRB 581, 583 (1975). Here, Respondent did not attempt to monitor whether employees would actually revoke their authorization cards, and in fact assured employees in the handbill that the revocation of their cards was solely the employees' decision. Further, the General Counsel did not allege, nor did the Administrative Law Judge find, any other unfair labor practices resulting from Nelson's meeting with employees. Under these circumstances, we do not find Respondent's conduct to constitute unlawful encouragement or solicitation of employees to revoke their authorization cards. Accordingly, we hereby dismiss this allegation of the complaint.

3. The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) of the Act by distributing and encouraging employees, in a coercive manner, to wear pro-Respondent T-shirts. However, the Administrative Law Judge made an additional finding that the T-shirts constituted an unlawful grant of a benefit in violation of Section 8(a)(1). Respondent has excepted to this finding, contending that the T-shirts were merely inexpensive pieces of campaign propaganda. We find merit in this exception.

A party to an election often gives away T-shirts as part of its campaign propaganda in an attempt to generate open support among the employees for the party. As such, the distribution of T-shirts is no different than the distribution of buttons, stickers, or other items bearing a message or insignia. A T-shirt has no intrinsic value sufficient to necessitate our treating it differently than other types of campaign propaganda, which we do not find objectionable or coercive. See, e.g., *Lach-Simkins Dental Laboratories, Inc.*, 186 NLRB 671, 672 (1970). Accordingly, we hereby dismiss this allegation of the complaint.

4. The General Counsel excepts to the failure of the Administrative Law Judge to include employee Carol Grut as an unfair labor practice striker.[6] Respondent opposes this exception, contending that Grut was not in fact a striker. We find merit to the General Counsel's exception.

The record reveals that Grut went to work as scheduled at 9 p.m. on Sunday night, April 19, 1981, and worked until 2 a.m. on April 20, at which time she left work due to illness. Prior to the time she was scheduled to work on the evening of April 20, Grut telephoned her supervisor and advised her that she would not be working that evening due to her illness. The next day a fellow employee telephoned Grut at home and informed her that certain employees had walked off their jobs the day before and were on strike. Grut indicated to the employee that she intended to honor the picket line, and in fact once Grut recovered several weeks later she did in fact participate in picket line activities.[7] Grut, however, never at-

[5] The mere publication of the addresses of the Union and the Regional Office does not constitute unlawful assistance. See *Tartan Marine Company*, 247 NLRB 646, 655-656 (1980).

[6] Although Grut's status was litigated at the hearing, the Administrative Law Judge omitted any discussion of Grut in his Decision.

[7] One of the exhibits introduced into evidence by Respondent contains a picture of Grut with a picket sign.

tempted to contact Respondent with the information that she would not be returning to work since she was honoring the picket line. Because of this omission Respondent contends that Grut voluntarily terminated her employment. We disagree. The record established that Grut was a striker and that Respondent knew or should have known of Grut's status as a striker. Although Grut did not specifically inform Respondent that she was a striker, Respondent treated Grut as a striker by sending her a letter dated April 20, 1981, stating that there were some jobs available for employees "currently having layoff status or otherwise not working" and that, if she were interested, she should telephone Respondent. Similar letters were sent to all of the strikers. If Respondent believed that Grut, who had at that point only missed at most 1 day of work with her supervisor's knowledge and permission, was not a striker and was in fact on sick leave, then Respondent would have had no reason to send such a letter to Grut. Moreover, once Grut failed to respond to the letter—which it is safe to assume anyone on sick leave would do in the belief that Respondent had mistakenly mischaracterized her sick leave—Respondent knew or should have known that Grut was participating in the strike. Finally, Grut's open activity on the picket line clearly established her status as a striker. Under these circumstances, we find Grut to be a striker and hereby modify the recommended Order to include her with the other strikers.

5. The Administrative Law Judge recommended a bargaining order to remedy Respondent's unfair labor practices. Respondent excepts to this remedy, contending that Respondent's unfair labor practices did not interfere with employee free choice in the election held on December 12, nor would they preclude the possibility of a fair rerun election. For the following reasons, we find, notwithstanding our reversal of certain of the Administrative Law Judge's unfair labor practice findings, that a bargaining order is appropriate to remedy the unfair labor practices committed by Respondent.

While we have reversed the Administrative Law Judge's findings that Respondent unlawfully instructed employees to vote against the Union, or urged employees to revoke their authorization cards, or unlawfully granted a benefit by distributing T-shirts, we have, with minor exceptions involving alleged violations which in any event do not affect our Order, affirmed all the other unfair labor practices which the Administrative Law Judge found. These include findings of 52 separate 8(a)(1) violations, involving 20 supervisors; 3 separate 8(a)(3) violations prior to the election; and 2 separate 8(a)(3) violations after the election, in addition to the unlawful discharge of all 115 strikers. As described below, there can be no question but that these massive unfair labor practices precluded the holding of a fair election and precludes the holding of a fair rerun election.

From the inception of the Union's organizational campaign among its employees, Respondent embarked on a course of retaliatory unfair labor practices. The Union began soliciting authorization cards from employees in July and August, and filed a representation petition with the Board's Regional Office on September 19. Even prior to the filing of the petition, Respondent sought to eliminate any employee support for the Union by threatening employees with plant closure if the Union was voted in, soliciting grievances, making promises of benefits, and interrogating numerous employees about their union activities. This unlawful activity was committed by many different supervisors, including Respondent's president and vice president, and involved large numbers of employees. In addition, Respondent threatened an employee with discipline if he continued soliciting on behalf of the Union, issued a warning to another employee for discussing the Union with a fellow employee, and discharged a known union adherent and member of the Union's organizing committee.

Respondent's unlawful campaign accelerated in the weeks following the filing of the representation petition. In addition to reiterating its threats to close the plant if unionization occurred, soliciting grievances, promising benefits, and interrogating employees concerning their union activities, Respondent threatened employees that any strikers would be fired, implied that selection of the Union would be futile, and required employees to read antiunion literature on worktime in work areas. Moreover, one supervisor passed around a petition for employees to sign opposing the Union. Respondent's unlawful activities continued up until the day of the election, reaching a peak during the last week before the election in which, in addition to a repeated threat of plant closure, a solicitation of grievances, and a remark implying that strikes would be inevitable, Respondent's supervisors attempted to ascertain how individual employees would vote and on the day before the election coerced employees into openly acknowledging their position in favor of Respondent by distributing T-shirts and encouraging employees to wear them.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Supreme Court approved our use of bargaining orders as remedies in cases marked by substantial employer misconduct which has the "tendency to undermine [the Union's] majority

strength and impede the election process."[8] The Court explained that, where the union had at one time enjoyed majority support among the employees, the Board, in fashioning a remedy, can properly consider:

> [T]he extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . .[9]

Here, Respondent's unfair labor practices tended to undermine the majority status of the Union.[10] It cannot be questioned that Respondent has committed serious and pervasive unfair labor practices. Respondent made numerous threats of plant closure, often to groups of employees. Such threats have been considered so serious that they have been held to justify a bargaining order, even absent other unfair labor practices. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. at 587–590, 615. In addition, Respondent discharged an employee because of her union activity. Such a violation has long been recognized as a serious unfair labor practice which "goes to the very heart of the Act."[11] Further, Respondent on numerous occasions threatened employees with discharge or discipline if they engaged in a strike or other union activity, and warned and suspended employees for engaging in union activity, while also telling employees that selection of the Union was futile and a strike inevitable. The message to employees was clear: If you have a union, you will have no job. Coupled with these unfair labor practices, Respondent solicited grievances, promised benefits, and engaged in numerous interrogations of employees. As noted above, all of these acts occurred throughout the entire election campaign and involved a large portion of the bargaining unit. In light of the nature and extensiveness of Respondent's conduct, such conduct clearly has the effect of undermining the Union's majority strength and the employees' expressed sentiments for union representation as indicated in the authorization cards executed by them.[12]

Further, for the reasons stated below, we find that Respondent's conduct also tended to preclude the holding of a fair rerun election. It bears reiteration that Respondent commenced its course of massive unfair labor practices immediately upon learning of the union campaign and continued its unlawful conduct, without interruption, up until the day of the election. We find the likely effect of this conduct, which signaled to employees Respondent's displeasure at union activity and the lengths to which it would go to stifle the employees' right to self-organization, would be to instill in employees a strong fear of loss of employment, such as would continue to be operative even in the event of a second election. Moreover, not satisfied that it had won the election, and lest any union support remain among the employees after the election, Respondent thereafter engaged in such serious and pervasive unfair labor practices that there can be little doubt that a fair rerun election is impossible. Most significantly, Respondent unlawfully discharged all 115 of its employees who engaged in a strike on either February 18, April 20, or April 30. In addition, Respondent discharged an employee for having engaged in union activities and threatened employees with discharge if they engaged in a strike. Such serious misconduct directed at over 20 percent of the unit would clearly instill in employees a strong fear of union activities which will not be soon forgotten.

Under these circumstances, we find it unlikely that a mere cease-and-desist order, the traditional remedy, will successfully eradicate the lingering effects of Respondent's unlawful conduct. Further, in view of the involvement of numerous supervisors as well as Respondent's top management officials in its unlawful campaign and its unrelenting punishment of employees for engaging in union activities both before and after the election, we further find it doubtful that a cease-and-desist order would deter the recurrence of unfair labor practices.

For all the above reasons, we find the possibility of erasing the effects of Respondent's unfair labor practices and of ensuring a fair rerun election by

[8] 395 U.S. at 614.

[9] *Id.* at 614–615.

[10] It is undisputed that by November 9 the Union had received valid authorization cards from a majority of the bargaining unit.

[11] *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[12] Respondent argues that the Administrative Law Judge erred in concluding that Respondent's unfair labor practices eroded support for the Union by 25 percent, contending that, if there were any erosion, it amounted to less than 10 percent. Respondent's argument misses the point. To impose a bargaining order the record need not demonstrate that an employer's unfair labor practices in fact caused a union to lose a certain amount of support. Rather, the Supreme Court clearly stated in *Gissel* that the Board may impose a bargaining order where the employer's misconduct has "*the tendency* to undermine [the Union's] majority strength and impede the election process." 395 U.S. at 614. (Emphasis supplied.) We are completely satisfied that this standard has been met in this case.

use of traditional remedies is slight, and that employees' representational sentiment once expressed through authorization cards would, on balance, be better protected by our issuance of a bargaining order than by traditional remedies.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, R. L. White Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(l) and 1(m) and reletter the remaining paragraphs accordingly.

2. Substitute the following as paragraph 2(e):

"(e) Expunge from its files any references to the warning given to Kenneth Browning on August 15, 1980; to the warning given to Jamie Bibb on or about September 3, 1980, and her subsequent suspension on January 2, 1981; and to the discharges of Sandra Burress on September 9, 1980, and Nancy Fried on January 6, 1981; and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them."

3. Substitute the attached notice and Appendix B for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate employees because of their interest in or activity on behalf of the Union.

WE WILL NOT threaten employees with discharge or discipline because of their interest in or activity on behalf of the Union.

WE WILL NOT threaten to close the plant because of employees' interest in or activity on behalf of the Union.

WE WILL NOT advise employees of the futility of selecting the Union as their bargaining representative

WE WILL NOT attempt to ascertain how employees would vote in a Board-conducted election.

WE WILL NOT encourage employees to read antiunion literature.

WE WILL NOT make available to employees company T-shirts in order to discourage their interest in or activity on behalf of the Union.

WE WILL NOT promise employees benefits in order to discourage their interest in or activity on behalf of the Union.

WE WILL NOT threaten employees with loss of benefits in order to influence their interest in or activity on behalf of the Union.

WE WILL NOT advise employees of the inevitability of strikes in the event they should select the Union as their bargaining representative.

WE WILL NOT solicit grievances and imply that such grievances will be remedied in order to influence employees against selecting the Union as their bargaining representative.

WE WILL NOT circulate a petition against the Union for employees to sign.

WE WILL NOT issue warnings or other forms of discipline to employees because of their interest in or activity on behalf of the Union.

WE WILL NOT suspend, discharge, deny a "birthday," or otherwise discriminate against employees because of their interest in or activity on behalf of the Union.

WE WILL NOT discharge employees because they engage in a work stoppage or other concerted activity for their mutual aid and protection.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer full and immediate reinstatement to Jamie Bibb, Sandra Burress, and Nancy Fried as well as those employees named in the Appendix attached hereto, and WE WILL make them whole for any losses they may have suffered as a result of the discrimination against them, with interest.

WE WILL make whole Jamie Bibb for our unlawful suspension and denial of her "birthday," with interest.

WE WILL expunge from our files any reference to the warning given to Kenneth Browning on August 15, 1980; to the warning given to Jamie Bibb on or about September 3, 1980, and his subsequent suspension on January 2, 1981; and to the discharges of Sandra Burress on September 9, 1980, and Nancy Fried on

January 6, 1981; and WE WILL notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

WE WILL, upon request, recognize and bargain with Louisville Printing & Graphic Communications Union Local No. 19, International Printing & Graphic Communications Union, AFL-CIO-CLC, as the exclusive collective-bargaining representative of a majority of the employees in a unit appropriate for collective bargaining with respect to wages, hours, and other terms and conditions of employment and will, if an agreement is reached, embody same in a written, signed contract. The appropriate bargaining unit is:

All full time and regular part time production and maintenance employees including shipping, receiving, and warehousing, truckdrivers, MLS control, magazine control, key entry, electronic graphic employees, and production programmers employed by the Respondent at its Louisville, Kentucky, facility, but excluding all office clerical employees, salesmen, and all professional employees, guards, and supervisors as defined in the Act.

R. L. WHITE COMPANY, INC.

APPENDIX B

Carol Allen	Darlene Samples
Dana Allen	Tony Sowder
Faye E. Bales	Debbie Hurt
Frank Barber	Betty Jackson
Steve Barker	Michael T. Jolly
Tammy Barnes	Marva Johnson
George Bell	Connie Jones
Dennis W. Black	Darlene Jones
Susan Blankenship	Lelia Kimbley
Ray R. Bloomer	Steve Klein, Jr.
Richard Bolton	John Landrum
Susie Bowles	Charles Lardner
Jim Brewer	Sheila Lasley
Pat Bumpass	Frances L. McNair
Mark Boyd	Joyce Moore
Debbie Carlton	Dayton R. Oliver, Jr.
David Clark	Susie Oliver
Joe Cole	Debbie Pittman
Alicia Daugherty	Floyd Quinn
Mike Davis	Shirley A. Radcliffe
Sheila Dennie	Arnold Ray
Rebecca Eglen	Keith L. Rayzor
Roger Eklund	Jerry W. Robinson
John Elsler, III	Connie D. Sanders
Virginia Freidrich	Carol Scheonbachler
Lena George	Rebecca Schultz
John Gering	Edward L. Sidebottom
Vince Giancola	Steven W. Smith
Rita Guillaume	Thomas N. Stith
Mary Hack	Marsha Sutton
Clarence Hawkins	Kevin Sweeney
San Hazelip	Lori Tobin
Susan Heavrin	Vivian Torrance
Ronald Hendricks	Mark D. Tuchscherer
Pat Hodge	Bill Veit
Patty Hoskins	Paul A. Walls
Lillie Howard	Sam Wedding
Mark Anderson	Don Weiger
Mike Anderson	Cindy Willoughby
Mary Allen	Lashelle Oglesby
Danny Alford	Linda Parker
Betty Craig	Devin Peers
Beth Dolen	Carmen Post
June Forree	Denise Reed
Jeroid Fawbush	Shirley Riggs
Jeannie Giberson	Jurella Thomas
Kenny Hutt	May Traxell
Mary C. Johnson	Yvonne Wallace
Jeffrey Littmath	Sherry Weigleb
David Lone	Steve Woods
Kim Clifford	Frances Byrd
Deborah Hall	Jamie Bibb
Jolly Hook	Flo Mulligan
Michael Jeffries	Wanda Pitchford
Genevieve Milner	Carol Grut

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: In mid-1980 Louisville Printing & Graphic Communications Union Local No. 19, International Printing & Graphic Communications Union, AFL-CIO-CLC (herein the Union), began a campaign to organize employees of R. L. White Company, Inc. (herein the Respondent or the Company), in a bargaining unit of nearly 500. The Respondent enlisted the services of Sherridan and Associates, a California-based management consultant firm, and there ensued a campaign characterized by counsel for the Respondent as "hard fought by both the Union and the Company."

An election was held on December 12, 1980. The tally of ballots shows that, of approximately 469 eligible voters, there were 210 votes cast in favor of the Union and 237 cast against it. There were 17 challenged ballots, an insufficient number to affect the results of the election.

At issue here is the Union's objections to that election and the General Counsel's seventh consolidated complaint in which there are alleged 123 separate violations of Section 8(a)(1) (in 17 general categories) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*; 17 separate violations of Section 8(a)(3) (including 5 discharges); and the unlawful discharge of 109 employees who participated in strikes on February 18 and April 20 and 30, 1981.

The General Counsel further alleges that at least by November 9, 1980, the Union had received valid authorization cards from a majority of the employees in the bargaining unit; and, given the intensity and pervasiveness of the Respondent's unfair labor practices, a bargaining order should be entered as an appropriate remedy.

The Respondent generally denies the substantive allegations of the complaint, though conceding there may have been some minor and technical violations of the Act by overzealous, low-level supervisors.

The Respondent contends that a bargaining order is barred by *res judicata*, a Federal district court in a proceeding under Section 10(j) having considered and refused to order such remedy; and, in any event, the unfair labor practices were not so egregious as to affect employees' freedom of choice in any rerun election.

In this respect, the Respondent moved to reopen the record to receive an affidavit of its personnel director concerning compliance with the 10(j) order. The motion is hereby denied. Such facts as are set forth in the affidavit, if true, are relevant to compliance issues and not to any substantive issue at this time. Further, that there may have been some compliance with a court injunction does not negate the necessity of entering a bargaining order to remedy substantial unfair labor practices where, as here, the circumstances clearly warrant it. See the remedy section, *infra*. An order under Section 10(j) does not purport to remedy unfair labor practices, but merely to return the parties to the *status quo ante* pending disposition by the Board.

This matter was heard before me from June 15 to July 2, 1981, at Louisville, Kentucky. Upon the record as a whole, including my observation of the witnesses and consideration of the briefs and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the printing and distribution of real estate multiple listings, Homes magazine, and related materials at its Louisville, Kentucky, facility. In connection with this business it annually ships directly from its facility to points outside the State of Kentucky goods and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[1]

A. *The 8(a)(1) Allegations*

1. Interrogation[2]

a. *By Michael McDowell*

It is alleged that on November 25, 1980,[3] Michael McDowell, the first-shift supervisor in the electronics-graphics department, coercively interrogated an employee about wearing an antiunion T-shirt. The evidence relating to this allegation is the testimony of Connie Sanders to the effect that McDowell asked her why she did not wear a company T-shirt (the Company had given employees T-shirts which were inscribed "RLW TEAM," *infra*).

The Respondent argues that Sanders had been seen by McDowell wearing a union T-shirt and that the conversation they had occurred in a noncoercive atmosphere. Therefore, according to the Respondent's brief, the questioning by McDowell was nothing more than "a passing and friendly conversation between two individuals in a work area of the plant on work time while both were performing their job."

Indeed, such is the gravamen of defense by the Respondent to most of the other alleged violations of Section 8(a)(1). While many of the acts alleged in the complaint could conceivably be characterized as isolated, trivial, noncoercive, and passing comments between a low-level supervisor and an employee, the extensive nature of the Respondent's organized campaign against the Union militates against a finding of casual innocence.

Further, I conclude that by asking an employee why she was not wearing a company T-shirt, and therefore not announcing her preference against the Union, McDowell unlawfully interrogated an employee concerning her union sympathies. In an organizational campaign such was clearly violative of Section 8(a)(1).

Similarly, Connie Sanders testified that on December 1 McDowell asked her what she thought was "going to happen in 12 days," and "he asked [her] how Theresa Jackson and Evelyn Strauder was [sic] going to vote." Although McDowell testified to this occurrence, he stated he did not "remember" asking "how other employees of the R. L. White Company were going to vote" but believed he did not. "I'm pretty sure that one of our rules, not to interrogate employees," he testified.

Sanders' positive demeanor, notwithstanding some minor discrepancies in her testimony concerning general-

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[1] Given the large number of allegations in this matter, the facts and analysis of each paragraph in the consolidated complaint will be treated *seriatim* by general category.

[2] The Respondent moved to dismiss the allegations of unlawful interrogation set forth in pars. 5(c)(viii), (p)(iii)(A), (r)(ii)(A), (r)(iii)(C), (t)(iii), (u)(iii)(A), (x)(iii)(A), (x)(ii)(B), (x)(vi), and (y)(ii)(A) on grounds that there is no evidence concerning them. Although there is evidence concerning other acts of the individuals named in these paragraphs, it does not appear from the record that the General Counsel presented any evidence specifically proving these alleged violations. Accordingly, in agreement with the Respondent, I conclude that these paragraphs should be dismissed for lack of proof.

[3] Unless otherwise indicated, all dates from August through December are in 1980 and from January through May are in 1981.

ly tangential matters, and the fact that McDowell did not deny this or the other conversation with Sanders, lead me to conclude that in fact the statements were made by McDowell substantially as testified to by Sanders. I conclude that McDowell unlawfully interrogated Sanders in violation of Section 8(a)(1) as alleged in paragraph 5(a)(vi).

b. *By Jonathan Mullins*

On August 29, shortly after Sandra Burress returned to work following 6 months of sick leave, she went to Shift Manager Jonathan Mullins' office to inquire about certain matters. According to her generally credible testimony, she was wearing a union button although Mullins testified that he had no knowledge of her interest in or activity on behalf of the Union at the time of this conversation. Burress testified that Mullins asked her, "Why do you feel you need a mediator to come in here and talk to me instead of coming to talk to me yourself?" It is alleged and I find that by this statement the Respondent unlawfully interrogated Burress.

Again, the Respondent maintains that, even if made, the statement occurred in a noncoercive atmosphere between a low-level supervisor and one of his employees and that other topics, including the Union, were discussed openly and freely. The Respondent contends that the statement was therefore not coercive and not unlawful.

I conclude that throughout the course of the organizational campaign continual statements of this type by the frontline supervisors necessarily affected employees' rights. I conclude that the Respondent violated the Act as alleged in paragraph 5(b)(i).

c. *By Steven E. Nelson*

It is alleged that on August 11 Theresa Jackson was unlawfully interrogated by Steven E. Nelson, the executive vice president of operations. Apparently, this allegation relates to the event in which Jackson was given a written warning by Nelson for soliciting authorization cards, *infra*. In agreement with the Respondent, I conclude that there was nothing in this conversation which amounted to interrogation of an employee concerning her union activity or that of others. Therefore, I conclude that paragraph 5(f)(i), to the extent that it alleges unlawful interrogation, should be dismissed.

d. *By Julia Wemberly*

It is alleged that on August 6 Supervisor Julia Wemberly unlawfully interrogated employee Theresa Jackson. The Respondent not only denies that the event occurred but denies that Wemberly was a supervisor or agent of the Respondent.

The Respondent maintains that as a data coordinator Wemberly at best was a leadperson with no authority to direct other employees. The General Counsel contends that Wemberly in fact performed supervisory functions and specifically on September 12 issued a written reprimand to employee Cindy Hall. The Respondent claims that this was an isolated act and that, in any event, it was common practice for leadpersons to make out such forms where one was tardy three times in a 2-week period. While this issue is close, I do conclude that the Respondent gave Wemberly sufficient supervisory authority so as to be responsible for her conduct during the organizational campaign. She in fact issued discipline to an employee during a critical period, notwithstanding that her immediate supervisor may later have noted his approval by signing the form.

Jackson credibly testified that she asked Wemberly about the possibility of working overtime with Wemberly stating she would take up the matter with Vice President John Jones. Later Wemberly told Jackson, "Before John Jones will give you permission to work overtime he wants to know why you are involved on the organizing committee of the labor union." This statement, I conclude, was unlawful interrogation in violation of Section 8(a)(1) as alleged in paragraph 5(g) of the complaint.

e. *By Patty (Young) Mattingly*

It is alleged that, during a meeting with employees on August 18, Patty (Young) Mattingly, in addition to promising benefits and soliciting grievances, *infra*, also coercively interrogated employees concerning their union sympathies. Although I conclude that in fact Mattingly did engage in conduct violative of Section 8(a)(1) during the course of this meeting, I do not find from the testimony of any of the General Counsel's witnesses that Mattingly made any statement which amounted to unlawful interrogation. Accordingly, I conclude that paragraph 5(h)(iii) should be dismissed.

f. *By Rick Asbury*

The General Counsel alleges that Rick Asbury, senior production editor, was a supervisor, which the Respondent denies. Although the evidence concerning his authority to direct employees is sketchy, it is noted that Asbury did, on behalf of the Respondent, issue written warnings to employees. This exercise of discipline establishes, at least *prima facie*, his supervisory status. There is no real evidence to the contrary.

It is alleged that on or about September 2 Asbury interrogated an employee concerning her union activity. During a conversation he had with Sandra Burress following her return to work, according to the undenied testimony of Burress, Asbury told her to come with him to the cafeteria because he wanted to talk with her. During their discussion, Asbury said, among other things, "I just want to know why you feel that we need a union here." I conclude this was unlawful interrogation in violation of Section 8(a)(1) of the Act as alleged in paragraph 5(ii).

g. *By Peter Pitsinos and Richard Stewart*

Peter Pitsinos was executive vice president of operations until March 19, 1981, and Richard Stewart was MLS production manager until March 17. They are no longer with the Respondent and neither testified at this proceeding.

It is alleged that on or about September 27 they coercively interrogated an employee concerning her union sympathies and activities. This allegation apparently re-

lates to a conversation they had with (Dorothy) Darlene Jones during which Pitsinos, according to Jones, asked, "what did I want a union for anyway."

Although I found Jones' reliability questionable (particularly as to the telephone incident prior to the strike on February 18, *infra*) her testimony about a discussion with Pitsinos and Stewart is not inherently incredible. Indeed, the nature of the conversation fits the Respondent's general pattern of antiunion activity. Inasmuch as Jones' testimony concerning this event stands undenied on the record, I conclude that the Respondent did violate Section 8(a)(1) of the Act as alleged in paragraph 5(j)(i).

h. *By Danny Poppelwell*

The Respondent admits that Danny Poppelwell was a supervisor prior to September 5 when the Company reduced the number of managers and supervisors and made Poppelwell a "production engineer, lead person." Although there is some indication in the record that the status of Poppelwell in fact changed in September, there is also evidence that he retained sufficient indicia of supervisory authority so that employees might reasonably look to him as being a spokesman for management. Thus, on September 12 Poppelwell issued a written reprimand—a disciplinary act. I therefore conclude that whatever changes may have occurred in September Poppelwell nevertheless continued to be a supervisor and the Company is responsible for his antiunion activity.

Although Poppelwell was called as a witness by the Respondent, he did not testify to any of the substantive allegations alleged in the complaint concerning his antiunion activity.

Specifically, Shirley Radcliffe testified that on October 21, during a conversation with Poppelwell, among other things, "He asked me why I wanted the Union in." I found Radcliffe to be a generally credible witness and, inasmuch as Poppelwell did not deny this or other statements attributed to him by various of the General Counsel's witnesses, I conclude that Poppelwell coercively interrogated employees as alleged in paragraph 5(1)(iii)(A).

It is also alleged that on October 23 Poppelwell interrogated Radcliffe. Although difficult to tell from Radcliffe's testimony whether this occurred in the October 21 conversation or in fact later, nevertheless Poppelwell not only asked her why she wanted the Union but asked her how many authorization cards the Union had and where they were kept. Again the substance of this was not testified to by Poppelwell. Thus, whether occurring on October 21 or on October 23—whether the same or separate conversations—I conclude the evidence does establish that Poppelwell unlawfully interrogated an employee concerning her interest in and activity on behalf of the Union in violation of Section 8(a)(1).[4]

[4] Perhaps the matter of asking Radcliffe how many authorization cards the Union had was meant to have been alleged in par. 5(1)(iv)(F). Whichever, it is clear that Poppelwell engaged in unlawful and coercive interrogation of an employee in violation of Sec. 8(a)(1).

i. *By Glenn Hurst*

It is alleged that on numerous occasions in September and October, Maintenance Manager Glenn Hurst coercively interrogated employees. The General Counsel's evidence concerning this allegation is the testimony of Raymond Quinn that he had several conversations concerning the Union with Hurst, Quinn asking Hurst as well as other supervisors what they thought about the Union. During those discussions, Quinn testified, Hurst asked how employees felt about the Union; and on the day before the election Hurst asked Quinn how he intended to vote.

Although testifying, indeed admitting some of the allegations concerning him, *infra*, Hurst did not deny the substance of Quinn's testimony. The Respondent nevertheless argues that Hurst did not engage in unlawful interrogation because his statements to Quinn did not have a coercive effect inasmuch as Quinn stated that he would vote for the Union and in fact went on strike. Notwithstanding Quinn's subsequent acts of support for the Union, the type of statement made to him by Hurst amount to unlawful interrogation. Such are the sort of inquiries members of management should not make of employees during the course of an antiunion campaign. To do so is presumptively coercive. I therefore conclude that the Respondent engaged in the violations alleged in paragraph 5(n)(iii) as alleged.

j. *By Joseph Ludwig*

It is alleged that on November 13 or 14 the third-shift press-bindery manager, Joseph Ludwig, interrogated an employee, presumably Edward Sidebottom, concerning his union sentiments. Although Sidebottom did testify to conversations with Ludwig concerning the union campaign, the Respondent argues that in none of these conversations did Ludwig say anything which could be construed as interrogation. In agreement with the Respondent I conclude that there is no evidence of interrogation by Ludwig and, accordingly, I conclude that the allegation in paragraph 5(o)(ii)(A) should be dismissed.

k. *By R. L. White*

It is alleged that R. L. White, the Respondent's president, interrogated an employee, presumably Darlene Jones, on September 30. The General Counsel's evidence with regard to this relates to the time when Jones was called into Pitsinos' office, with Stewart and White present, during which she was asked by them various matters concerning the organizational campaign. She testified White asked her "why were the people displeased and why did I think we need a union in this company."

As noted above, neither Pitsinos nor Stewart testified in this matter, and they are no longer employed by the Respondent. Neither did White testify. Thus, the only evidence concerning this allegation is the testimony of Jones, which I credit. I conclude that in fact, during a meeting in which she was talked to by high-level supervision, the president of the Company did unlawfully interrogate her as alleged in paragraph 5(t)(i)(A).

The fact that Jones may have exhibited a strong will during the course of this meeting is not sufficient, as argued by the Respondent, to conclude that White's interrogation was not unlawful.

1. *By John Jones*

In paragraph 5(x)(ii)(A) it is alleged that Vice President John Jones coercively interrogated an employee concerning her union sympathies. The General Counsel's evidence with regard to this apparently is the testimony of Cheryl McMichael to the effect that Jones called her into his office and asked her, "if we had a vote today, how would I vote."

There is also testimony of Nancy Fried to the effect that Jones asked her if she were for the Union. Such also amounts to interrogation of employees in violation of Section 8(a)(1) notwithstanding that Fried made an affirmative reply which, according to the Respondent's analysis, means that she was not intimidated by the interrogation. Such questioning by high-level supervision is inherently coercive of employee Section 7 rights.

Jones did not testify in this proceeding and thus I find that the statements attributed to him by McMichael and Fried occurred substantially as testified to by them. I conclude that Jones did interrogate employees in violation of Section 8(a)(1) of the Act.

Similarly, Joanne Johnson testified that Jones called her and asked, "is Cheryl McMichael for or against the union?" Johnson told him yes (presumably meaning for) and Jones hung up. This too is clearly interrogation in violation of the Act and notwithstanding the Respondent's contention that the inquiry took place in a noncoercive atmosphere. I conclude that the Respondent did violate Section 8(a)(1) of the Act as alleged in paragraph 5(x)(vii).

2. Threats of discharge or discipline[5]

a. *By Jonathan Mullins*

It is alleged that on October 16 Jonathan Mullins threatened employees with discharge if they engaged in a strike or other protected activity. This event was testified by Michael Olinick, who stated that he and Kim Clifford had been discussing the consequences of a strike. Mullins was asked what he thought and he told them that the Company could fire strikers and hire new employees.

The Respondent contends that such was not violative of the Act inasmuch as Mullins was brought into the conversation and did not initiate it. Secondly, the statement was not improper "because it accurately stated the law regarding economic strikes," according to the Respondent's brief.

In disagreeing with the Respondent, I conclude that Mullins' statement did not accurately state the Respondent's right in the event of an economic strike. The Respondent does not have the right to discharge economic strikers. E.g., *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979). Thus, to tell employees that such is a possibility is not an accurate statement of the law; and such necessarily threatens employees with discharge in the event they exercise their protected right to strike. I conclude that by making this threat, undenied by Mullins, the Respondent violated Section 8(a)(1) of the Act as alleged.

b. *By Richard Stewart*

On August 8 employee Kevin Sweeney was called into Stewart's office and told the Company had had complaints about Sweeney soliciting—apparently authorization cards. Stewart told Sweeney that there would be "no solicitation on company property at any time." Sweeney protested that Federal law gave him this right, to which Stewart answered, "Well, I don't know how strong that Federal Law is, but you're not going to solicit on company property at any time. He said, if you want to solicite [sic], take him to Kelly's bar or someplace, but don't do it here at R. L. White." And Stewart then pointed out the Company's rule concerning solicitation, which the Respondent notes was not an unlawful rule.

At the end of this discussion Sweeney asked what would happen if he were caught soliciting on his lunch hour in the parking lot. Stewart answered, "Well, you can take it for what it's worth."

The Respondent argues that this is an ambiguous, and therefore meaningless, statement and does not amount to an implied threat. In agreement with the General Counsel, I find that, by making this statememt in the context of his general prohibition of soliciting on behalf of the Union, Stewart did impliedly threaten discipline should Sweeney exercise his right to engage in such activity on his lunch period in the company parking lot. I therefore conclude, as alleged, that the Respondent through Stewart violated Section 8(a)(1) of the Act.

c. *By Danny Poppelwell*

It is alleged that on October 23 Poppelwell threatened an employee with discharge if that employee went out on strike. The evidence in support of this allegation is apparently the testimony of Radcliffe:

> Q. And did he [Poppelwell] say what would happen if you went out on strike?
>
> A. That we'd be downtown looking for another job, at the Unemployment Office.

As noted above, I found Radcliffe to be a generally credible witness in spite of the Respondent's assertion that she should not be credited because she appeared to be nervous, an insubstantial reason for discrediting a witness, particularly as her demeanor did not change. Further, it is noted that Poppelwell testified on behalf of the Respondent but was not interrogated concerning this or other substantive allegations of the complaint. I find that the statement attributed to Poppelwell occurred as testified to by Radcliffe and amounted to a threat of discharge should employees engage in a strike. Poppelwell's statement could have no other reasonable meaning than that employees would be terminated should they exercise

[5] The Respondent moved to dismiss certain allegations of threats for lack of any proof. In agreement with the Respondent the following paragraphs of the complaint are dismissed for failure of the General Counsel to establish them through any evidence: 5(i)(ii), (k)(i), (l)(i), (l)(iii)(C), 5(o)(iii), (q)(i), and (x)(iv).

their rights to strike. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5(1)(iv)(D).

d. *By Joseph Ludwig*

On February 18, 1981 (apparently shortly prior to the strike), a number of employees on the night shift were having lunch with their supervisor, Joseph Ludwig. According to the testimony of Michael Jolly, Ludwig stated more than one time that any employee who walked out would be fired because the Company had deadlines and could not afford to have people walking off the job.

Although some of what Jolly testified to was not in his pretrial affidavit, generally his testimony was not so inconsistent with his affidavit as to raise the inference, argued for by the Respondent, that he should be discredited. On the contrary, I found Jolly to be believable and noting that Ludwig did not deny the statements attributed to him, stating only that he had been advised not to threaten employees, I conclude that Ludwig did tell employees should they go on strike they "probably won't have a job." Such is a threat in violation of Section 8(a)(1).

e. *By John Meckisis*

John Meckisis is the maintenance supervisor. It is alleged that on the day of the first strike (February 18, 1981) he threatened an employee with discharge if that employee went on strike. Although Meckisis flatly denied the Company would fire striking employees he did testify, "I told Eddie (Dean) that any time anybody walked off the job as far as I knew they were assumed to had quit, and they were terminated. I said every job I'd ever been on before if a man walked off, that was all she wrote."

Although the words Meckisis admitted he told employees are different than those testified to by the General Counsel's witness, Keith Rayzor, the import is clearly the same, Meckisis in effect admitted that he told employees that if they went on strike the Company would consider them to have been terminated. Such is far from a mere announcement of the Respondent's right that it can replace economic strikers. Rather, the statement by Meckisis is an unequivocal assertion by supervision that in the event an employee went on strike he would be considered to have been terminated. Such is clearly a threat in violation of Section 8(a)(1). I conclude that the allegation in paragraph 5(p)(v) has been sustained.

f. *By Charles Metcalf*

It is alleged in paragraph 5(q)(iii) that during November Production Manager Charles Metcalf threatened employees with unspecified discipline because of their union sympathies. This allegation apparently is meant to have been established through Sandra Moore, who testified that Metcalf said that after the election "they were going to weed out all the people that didn't work—weren't good workers."

The Respondent maintains that it has the right to discharge employees who do not work or who do not work well, and such is certainly true. However, for a supervisor to say so during an organizational campaign and note that discharges will take place following the election implies a threat that employees will be terminated because of their union activity. There is no reason for a supervisor to make such a gratuitous statement of management's right to retain whomever it wishes or discharge employees because of poor workmanship. Such an observation made during an organizational campaign makes no sense other than as a vehicle to threaten employees. Accordingly, I conclude that the Respondent did violate Section 8(a)(1) of the Act as alleged.

g. *By Rick Bobo*

In paragraph 5(z) it is alleged that Shift Manager Rick Bobo threatened an employee with discharge if he went on strike on February 18, 1981. In support of this allegation the General Counsel offered the testimony of John Elsler, who stated that on February 18 he saw employee Jimmy Joyce talking with Bobo. Elsler overheard Joyce ask Bobo what he would do if the employees walked out and Bobo replied, "we've already got the pink slips written up, let them walk." Given that Elsler was a generally credible witness and that Bobo did not testify, I conclude that Bobo did make such a statement. A "pink slip," in common parlance, is a discharge notice. I therefore conclude that by telling an employee that pink slips were made up already for employees who might go on strike amounted to a threat of discharge should they do so.

The fact that Elsler went on strike even after having heard this warning by Bobo does not negate its coercive nature and does not render a statement otherwise violative of the Act permissible. I conclude that the Respondent did violate Section 8(a)(1) of the Act as alleged.

h. *By Frank Coffman*

It is alleged that in late September the second-shift pressroom department manager, Frank Coffman, threatened an employee with discharge for distributing union literature. Although this is generally denied by Coffman, Edward Sidebottom testified that Coffman told him, "Anybody caught hanging up or passing out union literature on union time—on company time, on company property at any time would be wrote up; and after three write-ups, you will be fired."

The Respondent contends that this testimony of Sidebottom is ambiguous and, therefore, he should be discredited and Coffman's version of this event credited—that Coffman merely informed employees in his department of the Company's prohibition of passing out union literature in the pressroom on company time. Coffman admitted telling employees that distributing union literature on worktime could be cause for a disciplinary writeup and that he reminded employees that three writeups in a year could be cause for further discipline, including discharge.

If Coffman's version of this event is credited then he was technically within permissible limits. While I tend to credit Sidebottom over Coffman, I note that even under Coffman's version his advice to employees was a gratuitous statement which included the possibility of discharge. And his statement was given in the context of his

seeking to have employees cease distributing union literature. Given the Respondent's overall conduct in this matter, I conclude that Coffman's statement about discharge in relation to the Respondent's attempt not to have employees distribute union literature was violative of Section 8(a)(1).

The General Counsel also contends that on November 11 Coffman threatened an employee, presumably Sidebottom, with discipline because of his union activities. However, there was nothing in Sidebottom's testimony which would indicate a threat was made to him by Coffman on or about the date indicated. Accordingly, I conclude the General Counsel has not proven this allegation of the complaint by a preponderance of the evidence and I will recommend that paragraph 5(bb)(ii) be dismissed.

3. Threats of plant closure[6]

a. *By Richard Stewart*

Shortly after the union activity began, Stewart had a series of meetings with employees to discuss the Company's pay scale and other benefits. At one of these meetings in August, it is alleged, he threatened employees with plant closure if the employees selected the Union as their bargaining representative. The General Counsel's proof with regard to this was from the testimony of Sidebottom and others. The Respondent contends that the testimony of the General Counsel's witnesses should be discredited and that this allegation should be dismissed.

Sidebottom testified that, when Stewart was asked if the employees would get a new pay scale if the Union got in, he replied, "Well if the Union gets in, the company couldn't handle it they would have to padlock the doors." Similarly, at another meeting of employees Stewart told Deborah Hurt "that if the union come in that this place would close up, that R. L. White would close—put padlocks on the door, because they couldn't afford to pay us anymore." This statement was by Stewart at or about the same time that he told employees that unions had closed down two other companies in Louisville.

Although Stewart did not testify, counsel for the Respondent speculates in his brief that what Stewart actually said was, "If the Union gets in, and if the company couldn't handle its financial demands, the company might have to padlock its doors." For high management to talk of padlocking the doors and the Union being selected by employees in the same sentence implies a threat to close. And I do not accept counsel's speculation over the sworn testimony of generally credible witnesses.

I find that Stewart told employees that, in the event the Union were successful, the Company would close. Also this goes well beyond permissible prediction protected by Section 8(c) of the Act. Stewart threatened employees with plant closure in the event they exercised their right to select a bargaining representative. Such was violative of Section 8(a)(1). I therefore conclude that the General Counsel has sustained the allegation set forth in paragraph 5(v)(i) of the complaint.

Similarly, it is alleged that on November 25 Stewart threatened employees with plant closure if they selected the Union as their bargaining representative. At a meeting MLS Shift Manager Joyce Harrison and Stewart had with employees on November 25 wherein they invited questions by employees, they were asked what would happen if the Union came in and the Company and the Union could not agree. Harrison, on behalf of the Respondent, testified that Stewart replied, "Given the financial status of the company, what would you do if you were them . . . . If it were me, I would padlock the door."

Counsel for the Respondent asserts that this statement is permissible under Section 8(c) inasmuch as it contains no threat but is merely a hypothetical prediction of what might occur. To the contrary, I conclude that it was in fact a gratuitous statement by Stewart that if the Union were successful the Company would close down. Implicit in the Respondent's argument is that Stewart told employees that if the Union were successful perforce the Company would be obligated to pay wages in excess of its financial ability to do so; and thus would be forced to close. Such is necessarily an inaccurate statement of the law and does not necessarily follow although high-level members of management indicated it did. This takes the matter out of the realm of permissible prediction and puts it into that of unlawful threat.

Beyond that, Joyce Harrison in effect admitted that Stewart told employees that in the event the Union came in the Company would close the plant.[7]

b. *By Peter Pitsinos*

It is alleged that, following a company golf tournament in mid-October, Pitsinos approached a group of employees (Sweeney, Jolly, and Gering) and engaged them in a conversation about the union campaign. During the course of their conversation Pitsinos asked "why we wanted a union anyway," and then told them, in the version of Sweeney, that "if the union got in, he'd just go ahead and close the plant down anyway." And he said this on two or three occasions.

The Respondent contends that this allegation ought to be dismissed inasmuch as there are some variances in the testimony of the three witnesses on behalf of the General Counsel. These variances are insubstantial. In general, noting that they were testifying some 9 months following the event, their testimony is in fact mutually corrobative and not inherently unreliable. In addition, I found the demeanor of these witnesses to be generally positive.

Thus, undenied on the record is a statement to three employees during the conversation about the organizational campaign by a high-level member of management that, in the event the organizational campaign were successful, the plant would close. Such was a clear violation

[6] Counsel for the Respondent moved to dismiss pars. 5(m)(ii) and (bb)(iii) on grounds that the General Counsel offered no evidence in their support. In agreement with the Respondent, I conclude that, inasmuch as there is no evidence in the record to support these allegations, they should be dismissed.

[7] The Company moved to amend the transcript to change Harrison's testimony from an admission that Stewart made the statement attributed to him by the General Counsel's witnesses to a denial. The Respondent's motion is denied. My notes indicate that the transcript is not in error.

of Section 8(a)(1) of the Act. I conclude that the allegation set forth in paragraph 5(k)(iv) has been sustained.

c. *By Glenn Hurst*

It is alleged that in August Hurst threatened employees with plant closure if they selected the Union as their bargaining representative. The Respondent contends that this allegation should be dismissed on grounds that Hurst always couched such statements in terms of his opinion and therefore the statements were predictions protected by Section 8(c). Thus, the Respondent relies on Hurst's testimony wherein he stated that, when asked the effect of the employees voting for the Union, he said, "I would state that I believed that if the union gets in and causes the company to lose money, which I knowed that we already was losing money for almost three years, then I said that I would say that the company would close the doors."

While expressions of personal opinion are generally protected by Section 8(c), in the context of this matter (during the course of an adamant antiunion campaign on the part of the Company and massive unfair labor practices directed against employees), for a supervisor to make statements to employees on many occasions to the effect that a natural and probable result of their voting for the Union would be for the plant to shut down is more than mere prediction. Such would not be viewed as opinion by employees, but rather as a threat. Use of the magic words "my opinion" does make a threat lawful.

I therefore find that Hurst in fact did tell employees that in the event they chose the Union a natural and probable result would be the closure of the plant. Such is a threat in violation of Section 8(a)(1). I conclude that the allegations set forth in paragraphs 5 (n)(i) and (n)(iv) are supported by the record.

d. *By Joseph Ludwig*

The General Counsel alleges that on two occasions in mid-September and again on November 13 or 14 Joseph Ludwig, in conversations with Sidebottom, threatened him with plant closure in event the employees selected the Union as their bargaining representative. Thus, Sidebottom testified that in mid-September Ludwig stated, "It's about over," and then stated, "Well if the union gets in, they will padlock the door. . . . If they padlock the door, you'll be looking down Sixth and Cedar" (the location of the unemployment office). And in November Ludwig told Sidebottom that the Union was not going to get in and then went on to state, "If it does, they're going to lock the doors."

The Respondent contends that these allegations ought to be dismissed on grounds that Ludwig testified he did not make such a statement, having been told in management meetings not to threaten plant closure. However, as with other supervisors, he had been told he could express his "personal opinion." He may well have thought he was conforming to the Respondent's general campaign tactic of attempting to stay within the bounds of Section 8(c) while at the same time threatening employees with adverse consequences in the event they exercised their Section 7 rights to choose a bargaining representative.

While Ludwig did deny the statements attributed to him by Sidebottom, as above, I found Sidebottom to be a generally credible witness. His testimony was detailed and inherently probable, while that of Ludwig was a denial of specific wording rather than substance.

I therefore find that on at least two occasions Ludwig did tell Sidebottom that a probable result of employees selecting the Union, which he did not think was going to happen, would be plant closure. Such amounted to a threat even though he may have stated it was his "opinion." And such violated Section 8(a)(1) of the Act as alleged in paragraphs 5(o)(i) and (o)(i)(B).

e. *By John Meckisis*

The General Counsel alleges that Maintenance Supervisor John Meckisis threatened employees with plant closure should they select the Union as their bargaining representative. The General Counsel's witnesses in support of these allegations were Lloyd Quinn and Paul Walls. The Respondent contends they ought to be discredited in favor of Meckisis.

Even so, Meckisis testified, "I made the statement that if I owned the company I would close the plant. That's the statement I made. I made it before and I'll make it again . . . I was against a union for R. L. White Company." His telling employees that he opposed the union organizational campaign and then stating that if he owned the Company he would close the plant is clearly threatening. Such is not a permissible statement of personal opinion protected by Section 8(c). It is a blunt threat given by a high-level supervisor. I conclude that the Respondent thus violated Section 8(a)(1) of the Act as alleged in paragraphs 5(p)(ii) and (p)(iii)(B).

f. *By John Metcalf*

Sandra Moore was filling in as a secretary in the office of the vice president. According to her generally credited testimony,[8] Metcalf came into the office, she asked what would happen to the Company if the Union came in, "and he said, if the Union got in they would go on strike and that ABC would close the doors and farm out all their work to other plant companies."

[8] The Respondent argues that Moore should be discredited inasmuch as she testified from memory that about 30 credit tallies she saw following the February 18 strike contained a written notation that the employee in question had walked off his job and had been terminated. In fact only two tallies are in evidence which contain that precise notation. There were other tallies offered in evidence with a notation similar in purport. The Respondent maintains that since Moore's testimony of 30 such tallies was an exaggeration she should not be credited. While her memory differs from the number of documents in evidence, such is not so substantial as to suggest either deliberate falsification of testimony or unreliable memory concerning the substance of events. Her testimony with regard to the credit tallies was substantively accurate notwithstanding that the numbers may have been off. Her testimony with regard to the credit tallies was that, following the February 18 strike, supervisors had made notations on documents to the effect that inasmuch as the employee in question had gone on strike she/he had been terminated. The inaccuracy of Moore's testimony does not weigh against what I found to be a generally credible demeanor and I do credit her testimony. I note further that her testimony concerning the conversation with Metcalf was not much different from his.

Metcalf, on the other hand, testified that Moore asked what would happen "if the union got in and it went on strike." Metcalf replied, "It was my opinion, or if I owned the company and we continued to be a nonprofit company like we are, and even under a strike situation, that I'd probably shut the company down." As with the other threats of plant closure, the distinction the Respondent seeks to draw between Metcalf's version of this event and Moore's is one without a substantive difference. The point is that a supervisor stated to an employee that a probable result of success in the union campaign would be for the Company to cease operations. Whether it counts as "opinion" or not, it is a clear threat of harm to employees and one which need not have been made. If Metcalf, and other supervisors, was not attempting to intimidate employees he could just as easily have offered the opinion, "I don't know." And such would have been accurate for the subject matter of the conversation concerning what might happen in the future. In short, I conclude that Metcalf did, as alleged in paragraphs 5(q)(ii), coercively threaten an employee with plant closure and thus the Respondent violated Section 8(a)(1) of the Act.

g. *By Steve Smallwood*

It is alleged in paragraphs 5(r)(ii)(B) and (r)(iii)(A) that, on three occasions in October and November, Supervisor Steve Smallwood threatened an employee with plant closure. The proof of these allegations is from the testimony of Tammy Barnes and, while the Respondent moves to dismiss paragraph 5(r)(ii)(B) on grounds there was no evidence to support it, the Respondent nevertheless notes that Barnes' testimony in fact does relate to three conversations with Smallwood.

Barnes testified, credibly I believe, that on these three occasions, Smallwood said in effect that if "the Union got in, the company would close down, because there's no money to give benefits or raises." The Respondent contends that these paragraphs ought to be dismissed on grounds that Barnes is not credible and that in any event Smallwood was merely stating his "personal opinion." As with the other threats by supervisors of plant closure, I do not believe that characterizing his statements as personal opinion, even if made to an employee, makes lawful that which is clearly otherwise unlawful. In addition, it is noted that Smallwood was not called by the Respondent to testify and, accordingly, Barnes' testimony is undenied on the record. Given this and what I felt to be her generally credible demeanor, I am constrained to conclude that in fact, as alleged, Steve Smallwood did threaten employees with plant closure and thereby violated Section 8(a)(1) of the Act.

h. *By Fred Haley*

Finally, on December 7, MLS Department Manager Fred Haley told Frances Byrd while showing her the newspaper article concerning strike violence, *infra*, "If a union gets in, the plant will close." He went on to state, when asked if the Union would jeopardize Byrd's job, "Probably it would, because the company do [sic] not want a union."

While Haley denied that he told Byrd that if the Union came in the plant would close, he did admit to distributing the Wilkes-Barre newspaper to employees and discussing that with Byrd. And Haley did testify that, in discussing the Wilkes-Barre newspaper and that strike, he indicated such "is a possibility of what could happen." Even accepting Haley's version in preference to that of Byrd, it is clear that such was an attempt by management through Haley to scare employees into believing that, in the event they chose to be represented by the Union, strike violence and plant closure would be a probable result. Such is clearly a violation of Section 8(a)(1) of the Act.

Beyond that, there is no real dispute in the testimony of Byrd and Haley concerning the substance of the conversation; namely, that a probable result of unionization would be plant closure.

I conclude that as part of the Respondent's effort to convince employees to vote against union representation the device of threatening employees with plant closure was used. Notwithstanding that often the statements of supervision may have been cast in terms of "personal opinion," I conclude that the message was clear and was repeated over and over throughout the preelection campaign—that, in the event the employees choose to bargain collectively, a probable result would be the loss of their jobs as a result of plant closure. Such is a serious and substantive violation of the Act.

4. The company T-shirts[9]

In several paragraphs of the consolidated complaint, the General Counsel alleges that the Respondent unlawfully distributed antiunion T-shirts and encouraged employees to wear them in the Respondent's facility. The Respondent argues as to each allegation that the event did not occur as testified to by the General Counsel's witnesses and that its supervisors did not encourage employees to take or wear a T-shirt. Indeed, the Respondent argues, for instance from the testimony of Terry Harrison, that supervisors were instructed not to give the T-shirts to employees or say to wear them.

However, this assertion by the Respondent is belied by the testimony of Harrison, as well as other supervisors, that they did carry boxes of T-shirts to various departments where the T-shirts were made available to employees. For the Respondent to put out such a large number of T-shirts (about one for each employee) could serve no purpose other than encouraging employees to wear them. Thus, without regard to the specific statements that may have been made by supervisors to employees, there is no doubt, and I find, that the Respondent made available to employees approximately 468 T-shirts bearing the inscription "RWL TEAM."

[9] The Respondent moves to dismiss par. 5(u)(iv) for lack of evidence. The Respondent does not argue the lack of testimony but the insufficiency and probable truthfulness of Kevin Sweeney with regard to the Von Welles distribution of procompany T-shirts. While there are two allegations concerning Welles' distribution of T-shirts, and testimony concerning only one incident, such is an insufficient basis to dismiss this allegation. I therefore conclude that this paragraph should not be dismissed for lack of evidence.

The Respondent maintains that such is permissible, citing *The Tappan Company*, 254 NLRB 656 (1981). I conclude, however, that *Tapppan* holds precisely the opposite. Here, as in *Tappan*, the T-shirts were obviously meant to be worn and to wear a T-shirt of this type implies the employee was in favor of the Company and opposed to the Union. By offering to employees these T-shirts, the Company clearly was attempting to get employees to make an open acknowledgement of their position in favor of the Company and opposed to the Union. I conclude that, by making the T-shirts available to the employee in the manner indicated, the Respondent violated Section 8(a)(1) of the Act. See also *Catalina Yachts*, 250 NLRB 283 (1980).

In addition, of course, a T-shirt is a thing of value, relatively minimal. Therefore, to give employees T-shirts immediately prior to an election is to grant them a benefit and such violates Section 8(a)(1) of the Act. *Trailways, Inc.*, 237 NLRB 654 (1978).

I therefore conclude that the allegations contained in those paragraphs relating to the distribution of antiunion T-shirts and encouraging employees to wear them have been sustained by a preponderance of the evidence.

5. The futility of selecting the Union[10]

a. *By Steven E. Nelson*

It is alleged that during the week of March 8, 1981, during a meeting he had with employees, Executive Vice President Steve Nelson threatened to refuse to negotiate with the Union even if ordered to do so by the Board. Although the General Counsel had four witnesses to this meeting who testified along those lines (e.g., Deborah Cox "if a union came in, that he would not recognize it"), Nelson denied he ever made such a statement.

He testified that, during these meetings, the question arose concerning recognition of the Union. He told employees that it was the Company's position that it did not want to take back the employees who had been on strike and that the Company did not want to recognize the Union. Nevertheless, Nelson testified, it was the Company's position that it could be overruled by the Board, and would comply when ordered.

Given the sketchiness of the testimony by the General Counsel's witnesses and what I consider the generally credible testimony of Nelson (noting that he candidly admitted facts substantially against the Respondent's interest, *infra*, in all probability his statements to employees were more along the lines he testified.

I do not believe he threatened employees with a refusal to recognize the Union even if ordered to do so by the Board. Nor does it seem probable that high management would make the sort of statement alleged some several months after election but at a time when this matter was pending. Such would have amounted to a gratuitous unfair labor practice at a time when there would be essentially nothing to be gained from it. I therefore conclude that the event did not happen as alleged in paragraph 5(f)(iv).

[10] The Respondent moved to dismiss pars. 5(l)(ii) and (1)(iv)(C) on grounds that the General Counsel offered no evidence on their support. I concur.

b. *By Danny Poppelwell*

In addition to the paragraphs for which there was no evidence, it is alleged that on two occasions Danny Poppelwell told employees that the Respondent would not recognize the Union, one time indicating that it would be futile for employees to select the Union as a bargaining representative and on another suggesting that the Respondent would not recognize the Union absent the employees going on strike.

These two events were testified to by Shirley Radcliffe, whom I found to be a generally credible witness. I conclude that the statements attributed to Poppelwell by Radcliffe occurred substantially as testified to by her and that Poppelwell did indicate the futility of selecting the Union as a bargaining representative.

As above, the Respondent contends that at the time of these events Poppelwell was no longer a supervisor and therefore the Company was not responsible for his conduct. I conclude, however, that he retained supervisory authority throughout the course of the organizational campaign and that through him the Respondent violated Section 8(a)(1) as alleged in paragraphs 5(1)(iii)(B) and (1)(iv)(E).

c. *By Terry Harrison*

Rayzor testified that, during a conversation between himself and Shift Manager Terry Harrison the day before the election, after Harrison asked how Rayzor intended to vote, Harrison went on to say, "We don't have to listen to what the union has to say. We don't have to give you any more money. The Company doesn't have any more money to give you."

The Respondent contends that this statement is not violative of the Act because it contains no threat of reprisal but "simply repeated the true nature of the collective bargaining relationship." However, I conclude Harrison's gratuitous statement, concurrent with his unlawful interrogation of an employee, *supra*, implied that it would be futile for employees to select the Union as their bargaining representative. The Respondent thereby violated Section 8(a)(1) of the Act as alleged in paragraph 5(m)(iii)(B).

d. *By Steve Smallwood*

During a conversation Supervisor Steve Smallwood had with Tammy Barnes in October or November, *supra*, he also told her that "he didn't think it would do any good if the union did get in." The Respondent maintains that Smallwood was merely expressing his personal opinion and therefore his statement is not violative of the Act.

As before, I conclude that the Respondent's attempt to clothe intimidation with legality by prefacing such statements with comments as "my personal opinion" is insufficient.

Smallwood did not testify. Although Barnes' demeanor was quiet, I believe that her testimony was reliable. I conclude that Smallwood made the statements attributed to him by Barnes and that he thereby implied to an employee that it would be futile for her to select the Union

as her bargaining representative. Such was violative of Section 8(a)(1) as alleged in paragraph 5(r)(iii)(B).

6. No-solicitation

The perimeter within which a company may bar solicitation by employees on behalf of a labor organization or distribution of union literature is well defined. E.g., *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981). In general, a company may require its employees to work during working time and may prohibit solicitation on behalf of the union on those occasions; but it may not prohibit employees from soliciting during break or lunch periods or from distributing literature in nonwork areas of the plant. Nor may a company enforce an otherwise lawful rule disparately. See *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). The Respondent had a rule in its handbook pertaining to solicitation and distribution the legality of which is not contested by the General Counsel.

The factual issues involved in this category of allegations concern precisely what employees were told by supervision with regard to soliciting support for the Union during the course of the organizational campaign. Thus, Roy Bloomer, for instance, testified that at a meeting of employees Stewart told employees "there would be no soliciting on company property, about a union, any stickers, any posters, any soliciting on the company parking lots, on the streets, anywhere . . . and if you were saw or caught doing any of this union activity, you would be wrote up and/or reprimanded."

Kenneth Browning testified that Larry Mitchell, an executive vice president of finance, told a meeting of employees in August that the Company did not want the Union "in there" and that "there was to be no soliciting on working hours or on the premises."

On the other hand, some of the General Counsel's witnesses gave conflicting versions of what they were told. Thus, Jerry Robinson testified that another employee asked Supervisor Martha Rhodes about the solicitation rule, to which Rhodes replied that, "you couldn't pass it out on company time." Later he testified, "She said that Dick Stewart had told her that you could not pass on company time or on your lunch break or on company grounds."

The testimony of witnesses for the General Counsel, if not accurate, would prove the imposition of an overly broad no-solicitation and no-distribution rule in violation of Section 8(a)(1). However, because the legality or illegality of a rule against solicitation depends on precisely what employees were told rather than their interpretation, to find a violation requires finding that certain specific words were stated to the employees. Though grammatical ambiguities will be held against the Company (*N.L.R.B.* v. *Harold Miller, Herbert Charles and Milton Charles, Co-Partners, d/b/a Miller Charles & Co.*, 341 F.2d 870 (2d Cir. 1965)), the General Counsel still has the burden of proving what employees were told. If there is a question concerning precisely what the Company told employees with regard to solicitation then a violation of this category cannot be found.

On balance, I conclude that the company supervisors did not in fact prohibit employees unlawfully from soliciting on behalf of the Union or distributing literature. I believe employees were told simply that they could not solicit during their worktime or the worktime of others. I note that the alleged injunction against their soliciting at all on company property was not in any respect alleged to have been followed up with discipline of any type. If the Respondent had in fact promulgated, even on an *ad hoc* basis, a rule prohibiting employees from soliciting while they were on breaks, surely there would have been evidence of some kind of warning or other discipline to the offending employees. Given the massive number of unfair labor practices by the Respondent, had in fact there been an effort to prohibit employees from soliciting during their free time, I believe that there would have been some evidence of discipline. The evidence is overwhelming that employees continued to solicit on behalf of the Union on company property throughout the organizational campaign.

I therefore conclude that the General Counsel's witnesses did not accurately recall the precise statements made to them by supervision about this matter. Some may have understood they could not solicit on free time, but what an employee might believe is not relevant. A violation must be based on objective evidence and I conclude the General Counsel has not been able to establish that the employees were unlawfully restrained from soliciting on behalf of the Union in violation of Section 8(a)(1). Accordingly, I will recommend the following paragraphs of the consolidated complaint be dismissed: 5(c)(i), (d), (e), (f)(ii), (s)(ii), and (s)(iii).

7. Antiunion literature

a. *Encouraging employees to read nonunion literature*[11]

It is alleged that during the course of the organizational campaign the Respondent distributed antiunion literature to employees through its supervisors and encouraged the employees to read the literature on their working time. Specifically, it is alleged that this was done weekly from September 1 through December 12 by the second-shift camera department manager, James Wallace; the MLS department manager, Fred Haley; and Steve Smallwood.

The Respondent admits that its supervisors, particularly including Wallace and Haley, passed out antiunion literature. Both Wallace and Haley acknowledged they did so and further acknowledged that employees were permitted to read the literature on working time. Haley testified that, after a couple of weeks of his passing out antiunion literature to employees, one threw it back in his face. In any event, the Respondent contends that supervisors could lawfully pass out antiunion literature.

It is one thing for a company to exercise its right under Section 8(c) and distribute nonthreatening, noncoercive literature in opposition to union organization. It is quite another for a company to distribute such litera-

[11] The Respondent moved to dismiss par. 5(u)(i) on grounds there is no evidence to support this allegation. I concur that the General Counsel brought forth no evidence and therefore this paragraph of the consolidated complaint ought to be dismissed.

ture in working areas of the plant and solicit employees to read it on working time while maintaining a rule prohibiting distribution of literature in work areas and prohibiting the solicitation during working time. Such is what the Respondent did here. Under the circumstances of this case, I believe that the distribution of antiunion literature by supervisors in working areas and requiring, or at least encouraging, employees to read the material during their working time was violative of Section 8(a)(1) of the Act. *Magnesium Casting Company, Inc.*, 250 NLRB 692 (1980). I therefore conclude that the allegations set forth in paragraphs 5(s)(i), (s)(iv), (y)(iii), and (r)(i) have been sustained.

b. *Disparate posting*

The General Counsel further alleges that during November and the first 2 weeks of December the Respondent permitted employees to post antiunion literature at the plant while at the same time denying other employees the opportunity to post prounion literature. No doubt there was a substantial amount of campaign literature distributed throughout the plant during the organizational campaign. Some were posted on walls, windows, ceilings, and machines.

The amount of paper consumed during this organizational campaign was massive. And notwithstanding the rule concerning distribution of literature, the Company, by its supervisors, the antiunion employees, and the prounion employees distributed literature throughout the plant throughout the campaign.

The essence of this allegation of the complaint is that the Respondent allowed antiunion employees to distribute literature while prohibiting prounion employees from doing so. Though there is much evidence that antiunion literature was distributed, there is no evidence that the Respondent's management actually treated the distribution by antiunion employees differently from that by prounion employees. Accordingly, I conclude that the General Counsel failed to establish by a preponderance of the evidence the allegation set forth in paragraph 5(cc) of the consolidated complaint.

8. Solicitation of grievances[12]

The allegations that the Respondent solicited grievances are intertwined with the allegations of interrogation and promises of benefits. Nevertheless, to solicit grievances from employees during an organizational campaign and promise, impliedly or not, to resolve them tends to interfere with employees' Section 7 rights. E.g., *Gil Gor Corporation d/b/a Gilman Street Gourmet*, 254 NLRB 972 (1981). The Respondent does not argue the unlawfulness of soliciting grievances, but does contend that the events testified to by the General Counsel's witnesses did not occur.

[12] The Respondent moves to dismiss the following paragraphs of the complaint on grounds that the General Counsel presented no evidence to support them: 5(c)(vii), (k)(ii), (p)(i), (t)(ii), and (t)(i)(V). The Respondent's motion is granted and these paragraphs will be dismissed.

a. *By Richard Stewart*

Betty Jackson testified credibly, and without contradiction, that in early August Stewart stated to her, "I want to know if there is anything you can tell me to talk to these people to try to keep the union out of here." She mentioned that the people wanted better wages, working conditions, and not to be harassed. And Stewart told her, "Maybe in six months or so, after the union business was finished, then maybe they could give the people better wages, better working conditions, what they needed."

While the Respondent maintains this discussion did not occur, Stewart was not called as a witness nor do I find the Respondent's reasons for discrediting Jackson to be persuasive. I conclude that in fact Stewart did make a statement to Jackson along the lines to which she testified and that such did amount to the solicitation of grievances and the promise to remedy them. By such activity, the Respondent violated Section 8(a)(1) of the Act.

b. *By Patty (Young) Mattingly*

In mid-August, as the campaign to organize for the Union was in full swing, Patty (Young) Mattingly held what she described as a "gripe session" among her employees. During this meeting, according to the testimony of Sheila Lasley, corroborated by Young, Young asked employees if they had any gripes or complaints.

Although there does not appear from the testimony of the General Counsel's witnesses that Young actually promised to remedy any of the "gripes," such is certainly implied. The fact that Young may have held such meetings with employees on previous occasions does not make lawful what I conclude was unlawful interference with employees' Section 7 rights.

It is clear that Young, as with other supervisors, was attempting to discourage employees' union activity by offering to resolve the complaints which management perceived to be the nexus of the organizational campaign. I therefore conclude that the Respondent, through Young, did violate Section 8(a)(1) as alleged in paragraph 5(h)(ii).

c. *By Rick Asbury*

It is alleged that on December 9 Rick Asbury solicited grievances from an employee and impliedly promised to resolve them. This occurred during the course of a conversation he had with Carol Schoenbachler wherein he asked what she thought the Union could do for her the Company could not. Schoenbachler mentioned the brief termination she had suffered in March and Asbury replied "that the Company had realized what they had done that the mess that they'd done, and it would never happen again."

Schoenbachler's testimony concerning the conversation with Asbury stands undenied. I conclude that it occurred in substance as she testified. Such, occurring 3 days prior to the election and in the general context of the Respondent's other unfair labor practices, including those engaged in by Asbury, amounted to the solicitation of a grievance and a promise to remedy it. I conclude

the Respondent thus violated Section 8(a)(1) as alleged in paragraph 5(i)(iii)(A).

d. *By Glenn Hurst*

In August, Plant Maintenance Manager Glenn Hurst asked employee Floyd Quinn "how the employees felt about the union. He asked me what the problems were." The General Counsel contends that this was unlawful solicitation while the Respondent argues that there was no promise to resolve grievances even if this statement could be construed as solicitation.

The Respondent contends that the statement could have related only to Hurst's work as plant maintenance manager. However, this is an unlikely way to discover maintenance needs. More reasonably Hurst's statement related to employee grievances in the press department rather than mechanical problems.

I conclude that, by his statement to Quinn, Hurst did solicit grievances during the beginning of the organizational campaign and that the solicitation of such grievances implies the promise to resolve them. The Respondent thereby violated Section 8(a)(1) of the Act as alleged in paragraph 5(n)(ii) of the complaint.

e. *By R. L. White*

Sometime in September Company President White asked Darlene Jones why the employees were displeased, why Jones thought they needed the Union, and whether there was anything he could do to change the employees' minds. During the course of this interrogation, *supra*, White also stated that he was sending his managers to a manager school and that he intended that employees' problems with regard to management would be resolved.

Although the Respondent does not seriously dispute the substance of Jones' testimony, the Respondent maintains that White was merely discussing with an employee his ongoing commitment to management training. Further, whatever solicitation of grievances that might have occurred, there was no promise to correct then.

To the contrary, I find that White did solicit grievances from employees and that his statements concerning his commitment to changing management impliedly promised to resolve grievances the employees had concerning working conditions. White violated Section 8(a)(1) of the Act as alleged in paragraph 5(t)(i)(B).

f. *By John Jones*

In late November, Supervisor John Jones asked employee Cheryl McMichael "if there was anything the company could do or he could do to change my mind or the people's mind."

The Respondent does not deny that the conversation took place as testified to by McMichael but contends that it was not coercive in that she was not intimidated. As noted above, evidence of actual coercion is not necessary to finding an 8(a)(1) violation. The test is whether the statements have a tendency to interfere with, restrain, or coerce employees. I conclude that Jones' statement did in the manner alleged. The Respondent violated Section 8(a)(1) as alleged in paragraph 5(x)(ii)(D).

In sum, as part of its total campaign against the employees' right to choose a representative through which they could bargain collectively, the Respondent sought the bases of dissatisfaction and promised on a number of occasions and to different employees that their grievances would be resolved. Such conduct by agents of the Respondent necessarily interfered with employees' Section 7 rights.

9. Promises of benefits[13]

a. *By Patty (Young) Mattingly*

It is alleged that during the meeting Young had with employees on August 18 she promised them improved working conditions. Specifically, Sheila Lasley testified that the Company was planning to replace the carpet with a tile floor, put in work benches, and make certain other improvements.

The Respondent contends that Lasley was not credible. In addition, the statement by Young did not amount to a promise of benefits because (1) she was merely relating a statement from high supervision and (2) her comments were "in response to long standing and persisting problems and complaints."And, finally, Young's statement did not amount to a promise of benefits because the Company had promised these changes to employees for 3 years.

It is clear from the testimony of Young that her statement to employees on August 18 in fact was a promise of benefits in order to discourage employees from seeking a collective-bargaining representative. It has long been held that a promise of improved working conditions made after the beginning of an organizational campaign, though planned long before, interferes with employees' Section 7 rights. As the Fifth Circuit put it, "Lightning struck only after the union's rod was hoisted." *N.L.R.B.* v. *WKRYG-TV, Inc.*, 470 F.2d 1302, 1308 (1973). I conclude that the Respondent violated Section 8(a)(1).

b. *By Richard Stewart*

It is alleged by the General Counsel that, during the September 27 meeting Stewart and Pitsinos had with Darlene Jones, Stewart "promised to reward the said employee if she provided Respondent with a copy of a document with respect to the Union's internal affairs."

In support of this, Jones testified that Stewart asked her if she would get him a copy of the Union's bylaws and stated that, if she did, he would give her a copy of the handbook (presumably the employee handbook). She told him that was not necessary because she had already given the union organizer her handbook.

This testimony fails to prove the allegation. At best, Stewart offered to give the employee a company document in exchange for a union document, both of which were matters of rather general distribution. I cannot conclude that in the respect alleged the Respondent violated

[13] The Respondent moved to dismiss par. 5(c)(vi) for lack of evidence. I concur.

Section 8(a)(1) of the Act, and I will therefore recommend that paragraph 5(j)(iii) be dismissed.

c. *By Peter Pitsinos*

Frances McNair had a longstanding problem concerning her seniority date. She had unsuccessfully complained about this prior to the advent of the organizational campaign. Then, in November, she and a coworker went to Pitsinos about this matter and he told her:

> "I can't give you anything now." He said, "You know what I mean."
>
> And I said, "Yes, I understand that."
>
> And he said, "But as soon as this thing is over, this will be corrected." He said, "Because everyone is going to be treated fair."

The Respondent contends that such is not a promise of a benefit inasmuch as the grievance predated the union campaign, that McNair initiated the discussion about her grievance, and that there is no evidence she was restrained.

As with the improved working conditions promised by Young in August, Pitsinos promised to remedy a longstanding grievance of an employee only after the union activity commenced; but advised her that he would have to wait until after the election. Again, "[l]ightning struck only after the union's rod was hoisted." I conclude that the statement by Pitsinos, undenied on the record, was a promise to remedy a grievance and therefore the promise of a benefit in violation of Section 8(a)(1) of the Act.

d. *By Joyce Harrison*

It is alleged that in early March 1981 Joyce Harrison promised an employee a benefit in violation of Section 8(a)(1) in that she stated the Company would give preferential treatment to nonstrikers.

Harrison admitted that she told June Forree that the Company would give employees an opportunity to move into other jobs and that the Company's bidding procedure would utilize factors which included not only seniority and job knowledge, but "your attendance and the type of worker that you are." Harrison may not specifically have told Forree that the Company would give preference in jobs to nonstrikers, however, the implication was clear. For a supervisor to tell an employee that attendance would be a factor was tantamount to saying that not striking would be a factor to be considered by the employer in granting transfers and promotions. Such is clearly a promise of a benefit to discourage employees from engaging in protected activity.

Such was not, as the Respondent contends, a statement of opinion or a mere statement of company policy. In fact it was a statement by a supervisor that the Company would treat those employees favorably who chose not to engage in activity protected by the Act. Conversely, the Company would penalize those who engaged in protected activity.

I therefore find that on several occasions, from the beginning of the organizational campaign through March 1981, the Respondent did promise employees benefits in order to discourage their engaging in protected activities. The Respondent thereby violated Section 8(a)(1) of the Act.

10. Threats of loss of benefits[14]

a. *By Rick Asbury*

The General Counsel alleges that on December 9 Rick Asbury threatened Carol Schoenbachler with denial of wage increases should the employees select the Union. He told her, she testified, that if the Union should get in "more than likely the raise would be frozen until they reached a contract."

The Respondent contends that the testimony of Schoenbachler is nonsensical. I do not agree. I believe that the import of her testimony is clear enough. She was told by Asbury that, in the event the Union won the election, there would be no wage increase until the parties reached a contract. Inasmuch as such follows when employees select a collective-bargaining representative, I cannot conclude that in this respect Asbury threatened an employee with denial of wage increases in violation of the Act.

This is not to say that an employer could not threaten an employee in the manner alleged in the complaint. However, to prove such a violation would require more definitive and detailed testimony than the mere statement attributed to Asbury by Schoenbachler. Accordingly, I conclude that the General Counsel has not brought forth sufficient evidence to sustain the violation alleged in paragraph 5(i)(iii)(B) of the consolidated complaint and that it should be dismissed.

b. *By Richard Stewart and Peter Pitsinos*

Similarly, it is alleged that Stewart and Pitsinos threatened Darlene Jones on September 27 with loss of benefits—a scheduled pay raise—if the employees selected the Union. Jones testified that, during the course of the conversation referred to above, she was told, if "the union come in, everything would be frozen." She asked what he meant and "he said, that just everything would be frozen."

The Respondent correctly points out that during an organizational campaign an employer may not create new benefits or increase old benefits unless such increases had been previously scheduled and committed. On the other hand, following an election campaign wherein a collective-bargaining representative is successful, an employer may not increase benefits without negotiating with the collective-bargaining representative and then it may only do so under circumstances. Thus, to tell an employee during the course of a conversation about such matters that wages would be frozen is merely a statement of the legal effect of selecting a bargaining representative. I do not believe such constitutes a violation of the Act. Accordingly, I conclude that paragraph 5(j)(ii) should be dismissed.

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[14] The Respondent moved that pars. 5(c)(iii) and (1)(iv)(B) be dismissed for lack of evidence. I concur.

c. *By Von Welles*

Finally, it is alleged that Von Welles threatened employees with loss of benefits on or about September 18. This allegation was not briefed by either party. My review of the record shows no testimony concerning this matter. Accordingly, I will recommend dismissal of paragraph 5(u)(iii)(B) for lack of evidence.

11. Ascertaining how employees intended to vote[15]

a. *By Peter Pitsinos*

The General Counsel alleges that, on several occasions shortly prior to the election, officials of the Respondent sought to ascertain how employees intended to vote. The General Counsel argues, and I agree, that such activity is violative of Section 8(a)(1) of the Act. *Strucksnes Construction Co., Inc.*, 165 NLRB 1062 (1967). The Board has consistently reasoned that a necessary prelude to discriminating against employees because of their union activity is learning their sentiments.

Thus, on December 8, Shirley Riggs went into Pitsinos' office to get a company T-shirt in order, she said, to disguise her true intentions. Pitsinos came in, they had a discussion concerning wearing the T-shirt, and Pitsinos said, "Well, it doesn't really matter whether or not you wear a tee-shirt"; he then said, "What matters is that you vote the right way." She assured him she would vote "the right way" and then he asked, "How are you going to vote."

The fact that this conversation took place as testified to by Riggs is not contested by the Respondent and Pitsinos did not testify. The Respondent, however, contends that it was not violative of Section 8(a)(1) because there is no proof that his inquiry interfered with, restrained, or coerced her. As noted above, actual evidence of interference is not material. I accordingly conclude that the Respondent did violate Section 8(a)(1) as alleged in paragraph 5(k)(v) of the consolidated complaint.

b. *By Glenn Hurst*

It is alleged that on December 12, during the conversation referred to above between Hurst and Quinn, among other things Hurst asked Quinn "If I had decided on how I was going to vote."

Although Hurst testified that he did not remember this conversation, he did state in general terms that he never asked anyone how he or she would vote. As with other aspects of this conversation, I tend to credit Quinn's testimony over Hurst's generalized denial and conclude that in fact Hurst did ask Quinn how he would vote. Such is clearly violative of Section 8(a)(1) of the Act, notwithstanding, as contended by the Respondent, that there is no evidence of actual coercion or restraint of Quinn. I conclude that the Respondent violated Section 8(a)(1) as set forth in paragraph 5(n)(v) in the consolidated complaint.

[15] The Respondent moved to dismiss for lack of evidence the allegation set forth in par. 5(t)(A). I concur.

c. *By John Jones*

It is alleged that during the week of December 1 Company Vice President John Jones coercively interrogated and asked employees how they intended to vote in the election. The General Counsel's witnesses in support of this allegation were Sanders, Hook, and Johnson. John Jones was not called to testify. Thus, undenied is testimony of the General Counsel's witnesses to the effect that Jones did attempt to ascertain how they intended to vote in the representation election (e.g., Hook: [H]e asked me how I was going to vote"). I conclude that the allegation set forth in paragraph 5(x)(i) has been proven.

Similarly, it is alleged in paragraph 5(x)(ii)(A) that Jones interrogated McMichaels in late November and also asked her how she intended to vote. Again, the testimony of McMichael is undenied on the record and I conclude that the event occurred substantially as testified to by her—that in late November Jones asked how she would vote in the election.

12. The inevitability of strikes

The General Counsel alleges that on a number of occasions immediately prior to the election various of the Respondent's agents distributed literature and told employees, in effect, that a natural and probable result of unionism would be strikes and violence. As to this category of activity, the Board recently adopted the holding of Administrative Law Judge Josephine H. Kline, "It has long been established that an employer violates Section 8(a)(1) by representing, either expressly or impliedly, that unionization will inevitably lead to strikes and violence." *Ducane Heating Corporation*, 254 NLRB 112, 122 (1981).

a. *By Mike McDowell*

Specifically, it is alleged that during a conversation Mike McDowell had with Tammy Barnes, *supra*, after showing her the literature relating to the Wilkes-Barre situation, McDowell stated, "Well, I think if the union got in this is what [sic] going to happen." Although McDowell denied in general that he threatened employees with the inevitability of strikes and violence, I credit Barnes' specific testimony. During the course of the conversation in which McDowell handed her the Wilkes-Barre strike newspaper he did indicate to her that an inevitable result of the employees voting for the Union would be this result. Such, I conclude, was violative of Section 8(a)(1).

b. *By John Jones*

During the course of the conversation that John Jones had with Cheryl McMichael, *supra*, among other things, "He went on to ask me questions like, have I heard the rumor that Kevin Sweeney said they were going on strike when the Union got in." Inasmuch as Jones did not testify and inasmuch as McMichael was generally credible, I conclude that Jones made the statement attributed to him. I further conclude that such a statement, in the context of the Company's overall campaign against the Union, was threatening in violation of Section 8(a)(1) notwithstanding the Respondent's assertion that there is

no evidence that McMichael was actually coerced. I conclude that the allegation set forth in paragraph 5(x)(ii)(C) has been proven.

c. *By Fred Haley*

Similarly, during the conversation Supervisor Fred Haley had with Keith Rayzor in September, Haley stated, among other things, that if there was a strike Rayzor would have to participate because he would be a union member. Again, the Respondent defends this allegation on grounds that there is no evidence of actual coercion from Haley's remark. I nevertheless conclude that the gratuitous statement by a supervisor concerning strikes in the event the employees select the Union and advising an employee that he would have to participate in it is violative of Section 8(a)(1).

d. *By R. L. White*

Finally, it is alleged in paragraph 5(t)(b) that R. L. White threatened employees with strikes and strike violence. This allegation, however, was not briefed by either counsel, nor did an independent review of the record reveal any testimony which would support finding a violation in this respect. Accordingly, I will recommend this paragraph of the complaint be dismissed.

13. Creating the impression of surveillance

The General Counsel alleges that in January and again in April 1981 the Respondent created the impression that employees' union activities were under surveillance. These allegations were not briefed by the General Counsel and the Respondent moved to dismiss them on the grounds that no evidence was adduced concerning these matters. I concur with the Respondent and will recommend that paragraphs 5(c)(x) and (x)(b) be dismissed.

14. Instructing employees to vote against the Union

The General Counsel alleges that the Respondent violated Section 8(a)(1) by instructing employees to vote against union representation. This occurred on December 11 when Terry Harrison showed employees a copy of the sample ballots with his thumb over the "yes box," saying, "tomorrow when you come in, you know, you'll have this to fill out. And we want you to vote 'no, the company wants you to vote 'no,' I want you to vote 'no.'"

It is a violation for an employer to use a sample ballot in order to encourage the employees to vote against the Union by defacing it in some respect. Thus, it is violative of the Act for a supervisor when holding a sample ballot to cover the yes box, point to the no box, and tell employees how to vote. E.g., *EDM of Texas, Div. of Chromalloy American Corp.*, 245 NLRB 934 (1979).

Again, the Respondent's principal defense is that there is no evidence that the employee in question was actually restrained in the exercise of his Section 7 rights. Again, I conclude such is immaterial. The Respondent, as alleged in paragraph 5(m)(iii)(A), violated the Act.

15. Restricting employees to their work area

The General Counsel alleges that on August 7 McDowell told Theresa Jackson that she could not leave her work area without first securing permission, and that he did this in order to discourage her union activity. McDowell testified, and Jackson agreed, that the import of his statement to her was that when she left her work area she was to advise him because he needed to know where she was. There is no indication in the record, or from Jackson's testimony, that McDowell restricted her to her work area more than would be necessary in order for the Respondent to function. Nor is there any indication from the testimony of Jackson that McDowell's statement related to her or other employees' union activity. Accordingly, I conclude that the Respondent did not violate the Act as alleged in paragraph 5(a)(i).

16. The petition against the Union

It is alleged that during the week of October 19 Danny Poppelwell passed around a petition opposing the Union and encouraged employees to sign it.

Jamie Bibb testified that Poppelwell came to her work area and approached employee Nancy Wolfe saying, "They were starting a committee for people against the union and he wanted to know if she wanted to sign this paper, and that's when he handed her the paper to sign." Although Poppelwell was called as a witness, he did not testify to this event nor deny it. Therefore I conclude that he in fact did pass out, and encouraged employees to sign, a petition against the Union sometime during the week of October 19. Such amounts to soliciting employees to oppose the Union and is thus violative of Section 8(a)(1). E.g., *Capitol Records, Inc.*, 232 NLRB 228 (1977).

The Respondent defends this allegation on grounds that, following the management shift after the advent of the organizational campaign, Poppelwell was no longer a supervisor; therefore, the Respondent was not responsible for his acts. As noted above, I conclude that Poppelwell continued to be a supervisor, or at least was perceived to be an agent of the Respondent. Thus, the Respondent is responsible for this act. I therefore conclude that the allegation set forth in paragraph 5(l)(v) has been proven.

Similarly, it is alleged that Poppelwell urged employees to demonstrate against the Union. Respondent moves to dismiss this allegation on grounds that there is no evidence offered in its support. This matter was not briefed by the General Counsel, and an independent search of the record does not reveal any evidence which would tend to support this allegation. Accordingly, in agreement with the Respondent I shall recommend that paragraph 5(l)(vi) be dismissed.

17. Urging employees to revoke their authorization cards

The only testimony concerning the General Counsel's allegation that the Respondent urged employees to revoke their authorization cards is the testimony of Thomas Stith, whom I found to be an unreliable witness. Nevertheless his testimony concerning the meeting at

which he was present in December with Steve Nelson, Mike Roberts, Danny Poppelwell, and Andy Lacoski with employees of the shipping department was undenied by the Respondent's witnesses.

During the course of that meeting, a handbill showing the NLRB and union addresses was distributed and Nelson told employees that if they wanted their authorization cards to be returned they could do so and he told them how.

Although Stith's testimony is somewhat vague, nevertheless it does appear, and is undenied, that Nelson made a gratuitous suggestion to employees concerning retrieving their authorization cards. For the executive vice president of operations to make suggestions to rank-and-file employees must necessarily be interpreted as urging employees to revoke their authorization cards. Such, I conclude, was violative of Section 8(a)(1) of the Act. The allegation in paragraph 5(f)(iii) has been proven.

B. *The 8(a)(3) Allegations*

1. Kevin Sweeney

It is alleged that on August 8, 11, and 12 the Respondent required Kevin Sweeney to take a lunchbreak at a time other than normal. The Respondent moves to dismiss this allegation on grounds that the General Counsel brought forth no evidence to support it.

The only evidence tending to support this allegation is Sweeney's testimony that following a discussion with supervisors concerning solicitation, *supra*, he started to shut down his press to go to lunch and Frank Coffman said, "Why are you shutting down so early?" Sweeney testified he said nothing to Coffman but continued to work until 7 p.m., at which time he shut down and went to lunch. Sweeney stated, without corroboration, that they normally stopped the presses at 6:45 in order to get ready, though he added, "Everybody goes five minutes early, whatever, to lunch."

There is no indication in the record that he did not in fact take his lunchbreak at the normal time and for the normal duration. Thus, I conclude that the evidence falls short of demonstrating that the Respondent discriminated against Sweeney in the respect alleged in paragraph 6(a) of the complaint. I will recommend that it be dismissed.

2. Jamie Bibb

a. *The job transfers*

The General Counsel alleges that upon her return to work from approximately 2 months of sick leave, Bibb was assigned different jobs on numerous occasions as a means by which the Respondent sought to harass a known union adherent. The General Counsel contends that these job "transfers" were thus violative of Section 8(a)(3) of the Act.

Although the proof is somewhat vague concerning the number of occasions when Bibb's job assignment was changed, the Respondent does admit that she was given different assignments other than those she had prior to her sick leave. The Respondent maintains the purpose of this was to cross-train her. And this followed from the Respondent's plan to consolidate various functions.

As the General Counsel points out, even though the job to which one is transferred is no more physically demanding or lesser paid, it can nevertheless amount to a less desirable working condition and thus be violative of Section 8(a)(3) where done with a discriminatory motive. And notwithstanding the Respondent's assertion to the contrary, Bibb's specific activity on behalf of the Union prior to her being transferred was in fact known to her supervisors—by observation and because she was named as one of the Union's in-plant organizers.

Nevertheless, I do not believe that Bibb was harassed or given undesirable work assignments because of her union activity. Rather, it is clear from the record that some change in work assignments was periodically needed; and specifically it appears from the record that in early August the Company meant to cross-train individuals in Bibb's department. This and the lack of proof that any of the jobs to which Bibb was assigned were in fact less desirable, or that she was in any way placed in jeopardy as a result of those transfers, suggest that the job assignments given to Bibb were made in the normal course of the Respondent's conduct of its business.

On the facts before me, I conclude that Bibb would have been transferred and given the various job assignments irrespective of the union activity in general or her participation in particular. I therefore conclude that the General Counsel has failed to establish by a preponderance of the credible evidence that the Respondent violated Section 8(a)(3) in its job assignments to Bibb in August. Accordingly, I shall recommend that paragraph 6(b) of the consolidated complaint be dismissed.

b. *The written warning*

Bibb took a week of vacation August 25–29. The following Monday was Labor Day and she also took off September 2 "as her birthday" pursuant to her request the week before to David Lutes.

On the morning of September 2, Poppelwell called her and asked her to come to work early. She said she would and then, remembering that she had to register for school, called Poppelwell back and told him that she could not come in and that she was taking off that day "as her birthday." He said she could not do so, and, if she did not come in, she would have to take it as a "write up day."

Wednesday, when Bibb returned to work, Metcalf gave her a written warning and told her that "there had to be a week's notice before taking your birthday off." Bibb told Metcalf that in fact on August 22 she had asked David Lutes if she could take September 3 as her birthday (from Bibb's testimony she meant September 2, the day following Labor Day). Lutes told her, "Well, I don't see there would be any problem."

The General Counsel alleges that the writeup of Bibb was discriminatorily motivated and thus violative of Section 8(a)(3). The Respondent argues that, inasmuch as Lutes was not a supervisor, he did not have the authority to authorize Bibb to take her birthday on September 2. Thus, when she refused to come to work on being called by Poppelwell, the Respondent was justified in disciplining her.

The question is not whether Bibb was correct or not in assuming that she had been given permission to take September 2 as her birthday (to which she reasonably would have been entitled inasmuch as her actual anniversary of birth was August 24). Rather, it is whether in disciplining Bibb for failing to come to work on September 2 when she thought she was entitled to leave that day, even after her explanation to Metcalf, the Respondent violated the Act—that is, whether the true reason behind the discipline of Bibb was her union activity.

On this record, I believe that Lutes had sufficient indicia of supervisory authority (he had signed written reprimands) so that Bibb could reasonably conclude he was authorized to approve a request to take a birthday holiday. Thus, Bibb's explanation to Metcalf was certainly reasonable. I believe that in the normal course of events (absent any union activity) her explanation would have been accepted by Metcalf even if Metcalf felt Lutes did not have the authority to authorize the leave. I find that Bibb's known union activity, and the union activity in general, was the causative factor in her being given a written warning. Such would not have occurred absent the union activity.

Accordingly, I conclude the Respondent thereby violated Section 8(a)(3) of the Act as alleged in paragraph 6(c) of the consolidated complaint. Although unclear from the record, presumably Bibb was not paid for September 2, nor did she subsequently receive a birthday holiday. Accordingly, I shall recommend that the Respondent make her whole and expunge the warning.

c. *The suspension*

It is alleged that a 3-day suspension given Bibb on January 2, 5, and 6 (which had the effect of causing her to lose 4 days' pay because she therefore was not paid for January 1) was discriminatorily motivated. The Respondent contends that the suspension was not motivated by Bibb's union activity.

The parties are in general agreement concerning the circumstances preceding the suspension. In brief, on December 22, Supervisor Mike Roberts asked Bibb, and other employees, to work voluntary overtime that day. Bibb testified, "I explained to him that I wanted the overtime because of the money with the holidays, but I hadn't been feeling well that day. I explained to him that if I felt better later on in the afternoon that I would stay over." Bibb did not in fact feel better and determined to leave. She could not find Roberts but told Poppelwell, who at the time was "doing attendance records," that she was not feeling well and was leaving. Poppelwell nodded and said, "Okay."

The General Counsel argues that inasmuch as the overtime was voluntary Bibb did not have to work it, and that the Respondent disciplined her for not working it. The Respondent contends that she was not disciplined for failing to work overtime. Rather, she was disciplined for "irresponsibility" inasmuch as she had led Roberts to believe that she would work overtime and then left without telling him she would not.

Although I disagree with the General Counsel's argument that Bibb was disciplined for failing to work voluntary overtime, I nevertheless conclude that the suspension was discriminatorily motivated. Whether or not Poppelwell was actually a supervisor at the time, it is clear that he was in a position of some authority. He was advised by Bibb that she was not feeling well and would not work overtime, a fact undenied by Poppelwell. Further, it is clear that even though Bibb had told Roberts that she would work overtime she did give the caveat that she was feeling ill and would work only if she got better. Thus, Roberts was advised beforehand that she might not work overtime; and the Respondent through Poppelwell was told when she decided not to work. In these circumstances I do not believe that the Respondent would reasonably conclude that Bibb acted "irresponsibly."

I therefore conclude that the discipline for her "irresponsibility" was a pretext to disguise Roberts' true motive. And I infer that the true motive was Bibb's known union activity irrespective of the fact that the election had been held some 2 weeks previously. The organizational campaign was still very much a live issue. The Respondent thus violated Section 8(a)(3) and I will recommend that this unfair labor practice be remedied by reimbursement of 4 days' backpay to Bibb and expungement of the discipline from her personnel record.

3. Theresa Jackson

a. *Changing the lunchtime*

It is alleged that on or about August 6 and on several occasions thereafter the Respondent changed the lunch period of Theresa Jackson in violation of Section 8(a)(3). While Jackson was called to testify, her examination did not touch on the subject matter of this allegation, nor was there offered any other evidence to support it. The Respondent moved to dismiss this allegation on grounds that the General Counsel failed to establish it by any evidence. I concur with the Respondent and will recommend dismissal of paragraph 6(e) of the complaint.

b. *The written warning*

It is alleged that on August 11 the Respondent discriminatorily issued a written warning to Theresa Jackson. Although Jackson did not testify concerning this event nor was this allegation briefed by the General Counsel, it apparently concerns an event on August 8 when Jackson attempted to solicit a fellow employee to sign an authorized card.

During this solicitation Jackson placed an authorization card in the blouse of the other employee. According to the undenied testimony of Steve Nelson, he gave Jackson a writeup, telling her, "It has come to my attention that you have been soliciting union authorization cards on company time, on company property; and this is in violation of the rules. You know, I just want to tell you that we're not going to have any more of it; and I would like for you to sign this right here. This is a disciplinary write up."

The Respondent had the right to prohibit solicitation of authorization cards on company time. Thus, even though Jackson was known to be one of the activists on behalf of the Union, the Respondent reasonably could

discipline an employee for physically thrusting an authorization card onto the person of a fellow employee. I do not believe that the discipline of Jackson for this particular event would in any way inhibit her or employees from their legitimate and lawful solicitation on behalf of the Union or from distribution of union literature. I believe this was reasonable discipline for the event the Respondent contends occurred, which was not contested by the General Counsel. I therefore conclude that the written warning to Jackson was not violative of Section 8(a)(3) of the Act and I will recommend dismissal of paragraph 6(f) of the consolidated complaint.

4. Kenneth Browning

It is alleged that on August 15 the Respondent violated Section 8(a)(3) by issuing an oral warning to Kenneth Browning with a written notification thereof put in his personnel file.

Browning testified that he was discussing guns with a fellow employee who was working. Supervisor Ken Spond gave Browning a verbal warning (though in writing) for talking about the Union.

The Respondent contends that this is not a violation of the Act because Browning admitted the discussion was about something other than the Union. Accordingly, the discipline of Browning could not have been because of his known or suspected union activity. However, Browning did testify without contradiction that the reason he was given for the discipline was because he had been discussing the Union. Thus, it is uncontroverted that the discipline of Browning was for his having engaged in union activity whether he actually was doing so or not.

Whether the discussion could generally have been prohibited by a lawful no-solicitation rule is unclear inasmuch as the circumstances surrounding this matter are at best sketchy. But because the evidence shows that Browning in fact was disciplined for discussing the Union with the fellow employee (regardless of what the true subject matter of the discussion) I conclude that the Respondent thereby violated Section 8(a)(3) of the Act as alleged in paragraph 6(g). The warning should be expunged from Browning's personnel record.

5. Sandra K. Burress

Sandra Burress was on sick leave from March until late August. When she returned to work, she met with Metcalf, Bobo, and Mullins, during which there was a discussion concerning her return to work, furnishing a doctor's statement, and not being able to take further sick leave for a year. She was not at this time asked about her availability to work overtime. However, during a second meeting that day Bobo asked her "if I had a problem with overtime." Burress replied, "Yes, I do, for the time being, at least until I return to the doctor in October." Bobo said, "Okay."

The next day, Burress signed a letter being named as one of the members of the organizing committee and thereafter began wearing a union T-shirt. Thus, the Respondent generally, and her immediate supervisors in particular, I infer, knew that she was a supporter of the Union's organizational campaign. I specifically reject the Respondent's argument in its brief that the mere fact that an employee wore a union T-shirt did not necessarily mean that the employee favored the Union. And I reject Mullins' testimony to this effect.

On September 2 Mullins went through the department and announced to everyone that they would have to work 2 hours of overtime. Because of her restriction on overtime, Burress clocked out at the end of her shift at 11 p.m. When she did so she told her supervisor, Rick Asbury, that she imagined Mullins had simply forgotten that she would be going home at 11 o'clock.

Similarly, the next day Mullins came by her desk and said, "Did you understand what I said about working ten hours?" Burress said she did not and Mullins told her they would have to be working 10 hours that night. Again Burress checked out at 11 p.m. and again she told Asbury that she was going to leave. When she left, Mullins asked her, "Did you hear what I said about working ten hours?" Burress replied that he had apparently forgotten she had a 40-hour restriction, and Mullins said, "I just wanted to make sure that you understood what I said about working ten hours."

On September 9 Burress was discharged by Charles Metcalf, who advised her that since overtime was required and inasmuch as overtime was going to be needed in her department the Company had determined to separate her.

The Respondent argues that the only reason that Burress was separated was because all of the other 212 individuals in her division were working overtime and it would be unfair to allow one exception.

The Respondent does not contest that on her return to work Burress had advised that she was under a doctor's restriction to work only 40 hours a week and that this would last until she saw her doctor in October. (Though unclear when she would return to her doctor, that could have been no more than 2 months in the future.) Further, the Respondent does not deny that subsequently when asked to work overtime Burress had reminded Mullins, as well as other supervisors, of this temporary restriction on her ability to work overtime.

The Respondent admits Burress was a good employee and does not deny being advised upon her return to work that she had a temporary restriction on being able to work overtime. She was allowed to return to work with this restriction at a time before she was known to support the Union. Further, the Respondent did not really establish the necessity for all employees to work overtime in late August. Thus, I conclude that the discharge of Burress for her inability to work overtime in September was a pretext to disguise the Respondent's true motive.

The true motive, I believe, was Burress' union activity which she took up upon returning to work as demonstrated by her signing the letter to the Company and overtly campaigning on behalf of the Union by wearing a union T-shirt. I believe that, even though the Respondent may have needed overtime work to be done, given Burress' situation, absent any union activity, she would not have been discharged so precipitously. I conclude, therefore, that by discharging Burress on September 9

the Respondent violated Section 8(a)(3) as alleged in paragraph 6(h) of the consolidated complaint.

6. Mark Tuchscherer

It is alleged that about September 10 the Respondent issued a written warning to Mark Tuchscherer in violation of Section 8(a)(3) of the Act. In support of this allegation, Tuchscherer testified, without contradiction, that on September 10 Shift Manager Rick Bobo said that he had received complaints from other employees to the effect that Tuchscherer had told them he enjoyed hassling management. Bobo told Tuchscherer to stop making such remarks and then later presented Tuchscherer with a handwritten statement which Bobo said he would place in Tuchscherer's file purporting to summarize the conversation.

This statement is apparently the written warning referred to in the consolidated complaint. The Respondent argues that in all probability the statement does not exist inasmuch as it was not produced or offered into evidence by the General Counsel. However, if it exists, it would be in files controlled by the Respondent. Further, Bobo, a midlevel supervisor for the Respondent, was not called to testify, which leaves undenied that in fact the conversation occurred substantially as testified to by Tuchscherer. I conclude that in fact there was some kind of a written memorandum of Bobo's statement to Tuchscherer.

Notwithstanding, such does not prove that Tuchscherer was given a written warning or that the warning was given in order to discourage his or other employees' union activity. There is no indication from Tuchscherer's testimony that he was criticized by Bobo for having engaged in any union or other concerted activity, nor is there any evidence to indicate that the Respondent had knowledge of Tuchscherer's union activity, if any.

Inasmuch as this was a large plant, that there was an ongoing organizational campaign does not mean that the Respondent would necessarily assume that all employees were involved. Nor can I infer that all statements to employees would be for the purpose of discriminating against them because of their known or suspected union activity. Accordingly, I conclude that the General Counsel failed to sustain by a preponderance of the credible evidence the allegation set forth in paragraph 6(i) of the complaint.

7. Theresa Wright

Theresa Wright quit her job on August 8 in order to join her husband who was serving in the Army in Germany. It developed, however, that there was a lack of available housing in Germany and thus her move was postponed. Then sometime around the first of September she was rehired by the Respondent as a temporary employee in a department which was in the process of being phased out due to the Company's conversion. When on September 26 her job came to an end, the Respondent terminated her, as it terminated three other such temporary employees.

The General Counsel contends that inasmuch as Wright wore a union T-shirt following her return to work in September and because she was an experienced employee it should be inferred that she was discharged on September 26 because of her union activity—that, absent her union activity, the Respondent would have retained her as an employee, presumably transferring her to another job.

It is noted that Wright not only was hired as a temporary employee for a temporary job, but it was known to the Respondent that she intended to leave for Germany as soon as possible. In these circumstances, I do not think the Respondent was bound to keep her on and find another job for her after the one for which she was hired ended. That is, I do not believe that the fact that the Respondent did not keep Wright on in these circumstances was so unreasonable as to presuppose a motive other than that to which the Respondent's witnesses testified—that Wright was terminated because her job ceased.

Before the Respondent knew of Wright's union activity, she was told her hire would be temporary. To conclude that the Respondent's failure to change its mind was based on discriminatory considerations is not warranted on the facts. The fact that Wright was a known union supporter is not, of itself, sufficient to support finding a violation of the Act. For these reasons, and those below, I conclude that the General Counsel has failed to establish by a preponderance of the credible evidence that Wright was discharged in violation of Section 8(a)(3) of the Act and I will recommend that paragraph 6(j) of the consolidated complaint be dismissed.

8. Michael Olinick

Throughout late summer and fall. the Respondent hired a number of employees on a temporary basis. This had to do with the conversion of several departments in the plant referred to above. The General Counsel does not contend that the hiring of temporary employees during the course of the organizational campaign was unlawful or that the general termination of the temporary employees was a violation of the Act. The General Counsel alleges only that the discharges of Theresa Wright, *supra*, on September 26 and of Michael Olinick on October 29 were unlawful because these two employees had demonstrated that they favored the Union.

Thus, Olinick was hired on August 11, and was told that his job was to be temporary and would probably end in October. Throughout the course of his employment, Olinick sought to become a permanent employee but each time was not encouraged. These attempts on his part and the Company's responses through its various supervisors occurred prior to any statement by Olinick to any supervisor that he favored the Union. Indeed it was only on October 27, after he had been denied permanent employment, that he told Lutes and then Mullins that, if there was a union, the Company could not hire temporary employees.

The General Counsel maintains that irrespective of the fact the job for which Olinick was hired ceased to exist, the Respondent nevertheless would have kept him on and placed him in another job but for his known union activity. Thus, the termination on October 29 can be found a violation of the Act by inference.

The General Counsel, however, does not explain why one should infer that Olinick and Wright would have been given other jobs following the cessation of the jobs for which they were hired where other temporaries were not. Given that the Respondent's policy was to terminate temporary employees when their jobs ended, and it did so, it is clear that Wright and Olinick were treated no differently from the others. Thus, I cannot conclude that absent their union activity they would have been treated differently.

Thus, I conclude that, notwithstanding they were known to have favored the Union, such did not play a part in the decision to terminate them and indeed they would have been terminated absent any union activity. Accordingly, as with Wright, I conclude that the General Counsel has failed to prove by the preponderance of the credible evidence that Olinick's termination on October 29 was violative of Section 8(a)(3) of the Act and I will recommend that paragraph 6(k) of the consolidated complaint be dismissed.

9. Lillie Howard

It is alleged that in late November the Respondent restricted the movement in its facility of Lillie Howard in violation of Section 8(a)(3) of the Act. Although Howard testified on behalf of the General Counsel, she was not interrogated concerning the subject matter of this allegation. Nor is there other evidence to support this allegation. I concur with the Respondent that paragraph 6(1) should be dismissed for lack of evidence.

10. Darlene Jones

It is alleged that on November 12 and again on December 1 Darlene Jones was issued written warnings because of her activity on behalf of the Union and thus the Respondent discriminated against her in violation of Section 8(a)(3) of the Act.

The facts surrounding the written warning issued Jones on November 12 are generally undisputed. As noted above, throughout the organizational campaign there was a substantial amount of literature circulated throughout the plant by the Company, as well as by the prounion and antiunion forces.

Literature on behalf of the Union included bumper stickers with the caption "Nail the Lie." They were stuck on windows of supervisors' offices, machines, walls, ceilings, and the like. The Company had attempted to promulgate a rule forbidding employees from placing these stickers but to no apparent avail. Supervisors from time to time removed the stickers, and the Company undertook to advise employees that affixing these stickers had to stop. Thus, Sidebottom testified, "Everybody heard about it, Frank [Coffman] let everybody know about the sticker." And Bloomer testified, "[I]f you were told to take off the union stickers or union posters and if you refused, you would be wrote up." Sidebottom, for instance, was told by Coffman to remove a sticker on two occasions and he in fact did so. Within a day or so following that, Coffman told Jones to remove one of these stickers and she refused.

Coffman's testimony is essentially undisputed by Jones. He said, "I asked her three times to remove it, and she refused to do so. At which time I told her that it would be a disciplinary writeup for failure to follow orders." And she was written up.

Jones contended that the Company had been harassing her and picking on her because of her union activities. She did not deny that she was instructed to remove the sticker and refused the instruction. Nor does the General Counsel contend that the Respondent did not have the right in these circumstances to order employees to take the stickers off the company property. Nevertheless, the General Counsel contends that, because Jones was an activist on behalf of the Union, to write her up for refusing an order of her supervisor was activity violative of Section 8(a)(3). I do not agree.

Certainly, even in the context of an organizational campaign a company has the right to give employees reasonable orders and those employees must obey the orders or suffer the disciplinary consequences. In this case the order was clearly legitimate and the discipline no more than would be reasonably expected under the circumstances. I cannot conclude in these circumstances that the Respondent disciplined Jones for any reason other than her failure to follow orders. Her union activity is not a shield to protect her from following any reasonable orders of her supervisors.

I therefore conclude that the General Counsel has not established by a preponderance of the credible evidence that Jones was given a written warning on November 12 in violation of the Act and I will recommend that paragraph 6(m) be dismissed.

The events surrounding the written warning of Jones on December 1 are also essentially undisputed, except with regard to one material fact. Employees for the Respondent were paid on Thursday evenings. Thursday of this particular week was Thanksgiving and thus payday was on a Wednesday. On Tuesday, Jones asked Coffman if she could be a little late returning from lunch (her normal lunchtime being from 7 to 7:30 p.m.) so that she could shop for Thanksgiving dinner. Coffman said that would be fine and to remind him the next night. Thus, when Coffman passed out the paychecks on Wednesday Jones did remind him that she would like to be late returning from her lunchbreak.

Jones then took off, cashed her check, went to a grocery store at least 6 and perhaps as much as 10 miles from the plant, bought her Thanksgiving groceries, took them to her home, and then returned either at 9:15, according to her testimony, or 9:30, according to Coffman. Coffman gave her a written warning for abusing the privilege of being "a little late" returning to work after lunch.

The material discrepancy in the testimony of Jones and Coffman concerns how late she said she would be. Jones told him, she testified, that she would be as much as an hour or two late and he said that would be okay since it was her time and her money. Coffman, on the other hand, testified that Jones asked if she could "be a little bit late."

The General Counsel not only asserts that Jones should be credited over Coffman but that it was the company policy to allow employees to spend working time doing personal shopping errands. On this the testimony of Ruth Grimes, an office clerical employee, was offered. She testified that, when running errands for high-level management as part of her duties, she would sometimes do personal shopping.

I do not credit Grimes. She was not a believable witness and her testimony concerning certain events was credibly disputed. I do not believe that Grimes was ever given permission to, nor did she in fact, with the knowledge of management, take time on her errands to do personal business. Particularly, I do not believe that she made personal shopping trips for 1-1/2 hours once every 2 weeks as she testified. Such absence from duty with, as she claims, the knowledge of management is inherently incredible.

Further, in resolving the conflict between Jones and Coffman, I am constrained to credit Coffman. First, I note that Frances McNair, who testified on behalf of the General Counsel concerning this event, stated that the day before Thanksgiving Jones asked Coffman "if she could possibly have a little extra time for lunch to go to the store and pick up some things she needed for dinner the next day." This statement is more corroborative of Coffman's testimony than that of Jones.

Although in many respects Jones' testimony was credible, I believe she had a tendency to exaggerate events in the light most favorable to her own position. Especially I found this to be the case when she testified concerning having to make a telephone call in relation to her child, *infra*. In general, I found Jones not to be a particularly reliable witness where her testimony conflicted with that of others. Further, there is no indication that the Respondent ever allowed employees to take off as much as 2 hours in order to do grocery shopping, even for Thanksgiving. Presumably, had this been a normal practice, other employees would have asked permission to do so and there would be evidence of such in years past.

On balance, I believe that Jones asked Coffman if she could be a "little late" returning from lunch so that she could cash her check and do some shopping but that she did not advise Coffman she intended to be gone 2 hours nor did he reasonably believe she would be. Thus, I conclude that Jones had not been given permission to take such an extended break and that the Respondent might reasonably have given her minor discipline for having done so. It does not appear that the written warning given Jones was excessive considering what she did. I cannot infer that the Respondent by disciplining her in this respect seized upon her failure to return from lunch in some reasonable time in order to discipline a known union activist.

I therefore conclude that the General Counsel has failed to establish by a preponderance of the credible evidence that Jones was disciplined on December 1 in violation of Section 8(a)(3) of the Act. I will recommend that paragraph 6(r) be dismissed.

11. Dennis Black

It is alleged that on or about November 24 the Respondent discriminatorily transferred Dennis Black from the second to the first shift for a period of 3 weeks. The Respondent admits that it transferred Black but asserts that it did so in an effort to train him on a new method of functioning in his job as a data coordinator and because it appeared that he needed additional training since he had made a serious mistake.

Prior to his transfer, Black had not been active on behalf of the organizational campaign, and had not worn a union T-shirt in the plant nor indeed participated in any way such that management would know of his union sympathies. He went on vacation in November and at that time became involved in the union activity. It was on his return from vacation that he was transferred, which he agreed at the time would be helpful to him. And the transfer did not appear to be for reasons other than those stated, or, at least, Black did not object.

There is nothing in the testimony of Black or otherwise in the record to support the conclusion that changing Black from one shift to another for a period of 3 weeks of training was somehow an adverse action against him. He was not disciplined, he lost no pay, and there is no evidence that the transfer had any undesirable consequences, even inferentially.

Beyond that, the overwhelming credible evidence is that the Company changed its operation somewhat during Black's vacation period and he needed to be trained on the new method. And it could be done more effectively on the first shift. While Black minimized the changes in the operation, he did agree that they existed and that training was required.

The other aspect of the training concerned discovery that Black had apparently misoperated the computer, thus partially destroying a data bank. Again Black minimized this and offered other explanations for the destruction of the data bank. But, from the credible testimony of the Respondent's witnesses, management certainly could have come to the conclusion that Black's operation of the computer was responsible and that he needed training. Black was not disciplined in any manner for this error.

Under these circumstances, I conclude that the Company exercised reasonable management judgment; I cannot conclude management was motivated by antiunion considerations or in any way discriminated against Black because of his union activity. Accordingly, I conclude that the General Counsel has failed to prove by a preponderance of the credible evidence the allegation set forth in paragraph 6(n) of the complaint and I shall recommend that it be dismissed.

12. Doris Sivils

It is alleged that on December 29 Doris Sivils was discharged in violation of Section 8(a)(3) of the Act. The circumstances surrounding this event are generally undisputed. On December 11, the day before the election, Sivils was late to work by 11 minutes because, according to her testimony, her "ride went off and left me." Two weeks later she was again late about 1 hour for the same

reason. And finally on December 27 she was again late for work and was discharged.

The General Counsel notes that Sivils was known to be a supporter of the Union and contends that for this reason the Respondent discriminatorily enforced an otherwise valid rule relating to tardiness. The General Counsel argues that Sivils was discharged for being tardy three times within a 30-day period although other employees, not known to be union supporters, had been late for work "many times" during the preelection campaign period and were not disciplined. Thus, from the disparate treatment it should be inferred that the discharge of Sivils for tardiness was not the true reason; but, rather, the Respondent's management was motivated to discharge Sivils because of her union activity.

The Respondent contends that Sivils was not really discharged for tardiness. Rather, she was discharged pursuant to a company policy established prior to the advent of the union activity to the effect that anyone receiving three written warnings in a 1-year period would be discharged. This policy went into effect in April 1980 and reprimands issued prior to that time were discounted (Sivils having previously received three disciplinary writeups). Thus, on April 25 Sivils was given a written reprimand for an unexcused absence, and on May 5 she was given a second reprimand for three tardies in a 9-day period. In September, Fred Haley became the supervisor in Sivils' department and at that time reviewed the personnel files of all employees. He told Sivils of her two writeups and that if she received another disciplinary reprimand prior to April 1, 1981, she would be subject to discharge. Sivils admitted this discussion.

The third disciplinary writeup and thus the cause of her termination was for having been tardy three times in a 30-day period. The record establishes that Sivils was not discharged for having been tardy so much as she was discharged for having received three disciplinary reprimands within a 12-month period, two of which predated any union activity. Although the third reprimand was a result of her having been tardy three times in a 30-day period, the fact that she received a reprimand for this does not appear from this record to have been disparate treatment. Others in fact were warned or reprimanded. And those whose tardinesses were excused were apparently not similar situations.

Given that Sivils was discharged for having received a third disciplinary warning within a 12-month period and the absence of evidence that other employees were treated differently in a similar situation, I am led to conclude that the General Counsel failed to establish that Sivils had been treated disparately.

Antiunion motive often can only be established through inference from such factors as known union activity, union animus, and timing, which in this case point toward unlawfulness. Nevertheless, just because an employee engages in union activity does not shield her from discipline which otherwise would have been meted out even in the absence of union activity.

It is clear that the Respondent established its policy concerning discipline and discharge long before the union activity in this matter. And, given that Sivils was at best a marginal employee, from the undisputed testimony relating to her work performance, I must conclude that even absent the union activity Sivils would have been terminated as she was. I conclude that the General Counsel failed to establish that Sivils was discharged in violation of Section 8(a)(3) of the Act and I will recommend that paragraph 6(o) be dismissed.

13. Jerry Robinson

The General Counsel alleges that in September the Respondent, in violation of Section 8(a)(3), restricted Jerry Robinson to his department. Initially, there was a dispute between Robinson and his supervisor, James Wallace, concerning Robinson's propensity for leaving his department. Robinson testified that he only left his department for business-related purposes while Wallace testified that Robinson had a habit of "wandering off." Thus, on several occasions, Wallace testified, he told Robinson to stay in his department unless he had business elsewhere. Robinson testified that Wallace restricted him to the department and did not suggest a business-related restriction. Other testimony, however, indicates that in fact when Robinson would leave his department, even for a business-related purpose, he would then stop and talk to other employees about a variety of matters, none of which apparently related to the union campaign.

Even accepting Robinson's testimony at face value, it does not appear that Wallace violated the Act by telling Robinson to stay in his department during working time. It is not unreasonable nor a violation of the Act for a company to demand of its employees that they work during working time. Beyond that, there is no evidence on this record that Wallace knew of Robinson's union activity at the time the alleged restriction was to have been made. While Robinson did testify that he signed an authorization card and wore a union T-shirt, he was not able to indicate that he was an overt supporter of the Union at or before the time he was allegedly restricted to his department by Wallace. But even if his union activity were known to Wallace, I do not believe on these facts it can be said that the Respondent violated the Act in the manner alleged. Accordingly, I shall recommend that paragraph 6(p) be dismissed.

14. Nancy Fried[16]

It is alleged that on January 6, 1981, the Respondent discharged Nancy Fried in violation of Section 8(a)(3). The Respondent contends that the Fried situation is similar to that of Sivils and that Fried was discharged for having received three written reprimands in a 12-month period, two of which were issued to her on January 6 at the time of her termination. Though noting it is unusual to issue two written reprimands simultaneously, the Respondent defended this action on grounds that attendance records had been lost and had to be reconstructed and only on January 6 did Metcalf learn that Fried had been tardy three times in November and four times since December 12.

[16] This spelling conforms to the complaint and documentary evidence. The transcript is corrected to conform.

I cannot accept the Respondent's argument that even absent the union activity Fried would have been given two simultaneous reprimands and discharged on January 6. The purpose of a disciplinary warning system is just that—to advise the employee of exposure to discharge so that the employee might amend her ways. If a disciplinary warning system is to mean anything, the employee must be given an opportunity after being warned to so conduct herself as not to be discharged. Where the employee is given two written warnings simultaneously and then discharged, to rely on the warning system is a sham.

Thus, the situation between Fried and Sivils is substantially different. Sivils in fact had received two warnings prior to the advent of the union activity and then continued to engage in the type of misconduct for which she had been warned previously. Although Fried apparently was tardy in November and December, she was not warned or given any discipline and thus could not reasonably have known that her acts would lead to discharge. Even if the Respondent did lose the attendance records, upon discovering Fried's tardiness in November and December, if the Respondent actually meant to warn employees and thus give them a chance, Metcalf would have given Fried a single disciplinary warning on January 6. The fact that he discharged her rather than warning her under these circumstances, I believe, raises the inference that the true reason for the discharge was not in fact her tardiness.

Having concluded that the alleged reason advanced by Metcalf was a pretext, I infer that the true motive behind the discharge of Fried was her support of the Union. While she was not particularly active on behalf of the organizational campaign, she was known to be a supporter. Thus, undeniably about a week before the election John Jones, the vice president of Homes magazine, called her into his office for a discussion about business and then asked her "if I was for the Union and I told him 'yes.' And then he said, that John Jones said that the realtors didn't want to do business with R. L. White if they had a union come in." I therefore conclude that the General Counsel did establish that Nancy Fried was discharged in violation of Section 8(a)(3) of the Act as alleged in paragraph 6(q) of the consolidated complaint.

C. *The Strikes*

1. The strike of February 18

The parties are in general agreement concerning the events leading up to the employees' strike of February 18. They differ only in whether the strike was economic or should be viewed as one to protest the Respondent's unfair labor practices and whether the Respondent violated the Act in its treatment of the strikers.

I conclude that the first issue is not material because the Respondent unlawfully discharged and thereafter failed to reinstate the strikers because they had exercised their protected right to engage in the strike.[17]

Though seeming to have changed its position now, the Respondent initially contended that employees had no right to strike on February 18. Thus, on February 20 the Union sent a telegram making an unconditional offer for the strikers to return to work on February 22. And some strikers attempted to come back to work on February 20. Each was refused entrance to the plant and each was advised that he or she would have to see Terry Durham, the acting personnel manager. When each was subsequently interviewed by Durham she asked them why they had not reported for work and they told her they had been on what they denominated an unfair labor practice strike, or that the employee in question had honored the ticket line. In either event, Durham told the strikers individually that the Company had been "restructured," and that "there were no job openings and that she was not sure that the individual employee had a job with the Respondent."

Although it is implicit in Durham's remarks that the strikers had been terminated, there is additional evidence that such was in fact the case. Poppelwell told employee Mary Hamilton on February 23 that some employees had walked out and "they just don't know they no longer have a job and they probably won't get their job back." Notations on tallies stated that striking employees had been terminated.

The Respondent maintains that it had already begun the process of restructuring the Company. Thus when the employees walked out, the process was advanced such that, by the time the striking employees offered to return to work 2 days later, there were no longer jobs for them. However, the testimony of Steve Nelson, the Respondent's executive vice president of operations, does not support the argument of the Respondent's counsel.

Nelson testified that the Respondent was restructuring the Company as a result of which 30 employees were laid off in January. He testified that they were laid off according to plant seniority, even though the reduction was only in Homes. He further testified that, had there been no strike in February, and had the Company gone forth with its restructuring process, there would have necessitated 30 to 40 layoffs in MLS. In such event, the employees would have been selected for layoff again according to plant seniority. However, inasmuch as 78 had gone on strike, rather than choosing seniority as a means for determining who would be laid off, the Respondent simply selected all those who had gone on strike. Thereafter 10 or 12 were recalled.

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[17] The General Counsel in argument and his witnesses in testimony on the events immediately preceding the strike suggest that the precipitating cause was the denial of permission to Darlene Jones to use the telephone shortly after she arrived for work at 3 p.m. on February 18 in order to report to a caseworker, presumably at the juvenile court, concerning her daughter. These reports were to be made each morning at 10 a.m. and were crucial. Jones did not explain why, if the call was so important, she had not made it earlier in the day other than to say that she discovered the pay phone near her home was "broke." Such still does not explain why she did not attempt to make the phone call prior to starting work on February 18. She could just as easily use the pay phone in the cafeteria before 3 p.m. as after 3 p.m. Though she had an altercation with Coffman concerning leaving her work station to use the telephone, I cannot conclude that such was necessarily Coffman's fault or that it amounted to unlawful harassment. In short, Jones' testimony is not particularly credible. Nevertheless, the perception of her fellow employees is probably more important than the true facts with regard to this matter and many of them did credibly testify that they felt she was being harassed. And this was the reason they went on strike.

From the testimony of Nelson, it is clear that employees were selected for layoff (or termination) simply because they had engaged in their protected right to strike. The Respondent brought forth no evidence that any of the strikers of February 18 were junior in seniority to any employee who was not terminated. Much less was there any evidence that all of the strikers were junior to those who did not go on strike.

The number of strikers terminated was exceeded by twice the number contemplated for layoff. Thus, the Respondent's argument that no jobs existed for the strikers is not supported by the facts. To the contrary, following the strike those employees who remained began working substantial overtime.

Nelson further candidly testified that it was the Respondent's determination to keep the Union from successfully organizing the Company's employees. At a meeting of employees in March wherein Nelson told them he appreciated their staying in, he was asked what would happen to those who were on strike. Undeniably, Nelson told employees that the Respondent had no intention of calling the strikers back to work. At another meeting of employees, testified to by Deborah Cox, *supra*, Nelson said that the Respondent "would do their best not to—to see to it that they [the strikers] wouldn't come back in."

There is no real question, and I conclude, that the Respondent determined to discharge each of the employees who went on strike on February 18 because that employee had done so.

Therefore, whether the strike initially was caused by the Respondent's multitudinous unfair labor practices or was simply an effort to force the Company to take some undesignated action is largely immaterial. Discharged strikers have an immediate right to reinstatement notwithstanding the argument that jobs no longer exist. *Abilities and Goodwill, Inc., supra.*

Furthermore, the Company's action in discharging the strikers, more perhaps than any of the other unfair labor practices outlined above, demonstrates the Company's determination to resist the organizational efforts of its employees by any means, including unlawful ones.

2. The strike of April 20

On April 20 approximately 29 employees walked off their jobs, this time to protest the imposition of mandatory overtime. Again the employees characterized their strike as one to protest the Respondent's unfair labor practices, which apparently they believed included the Respondent's requirement that they work substantial overtime. These employees offered themselves unconditionally to be reinstated and for the most part were denied.

On April 20 the Respondent sent letters to many, if not all, of the strikers to the effect that there were some job openings and for employees "currently having layoff status or otherwise not working" to call the Company for interviews. Many of the striking employees did call for interviews but were not given jobs, whereas the Company hired several individuals who had not been previously employed.

3. The strike of April 30

Finally, on April 30 a group of second-shift employees determined that they would join the other strikers. The precipitating event here involved the failure of someone to turn on the glue machines. Why this would cause the bindery employees to strike was not explained. Nevertheless, they did join the others. After they had been on strike a few days they decided to return to work and again the Union's business representative, David Grabhorn, sent a telegram to the Respondent making an unconditional offer for them to return to work. As the others, this offer was refused.

4. Analysis

In his opening statement counsel for the Respondent indicated that irrespective of the employees' right to strike on February 18 the second and third strikes were some kind of harassment and were thus unprotected. However, the Respondent offered no evidence in support of this contention. On this record I conclude that all the employees who went on strike, whether on February 18 or April 20 or 30, were similarly situated. These were not partial strikes but were total cessations of employment concertedly engaged in by the participating employees to protest actions of management. In effect, employees who struck on April 20, as well as those on April 30, were simply joining fellow employees who had begun the strike activity on February 18. They were engaged in protected concerted activity and were discharged for having done so. The striking employees of April 20 and 30 stood in no different position than those of February 18. They were unlawfully discharged for having engaged in a strike and are entitled to immediate reinstatement as of the date of their discharges which, on this record, I conclude was immediate. *Abilities and Goodwill, Inc., supra.* All the evidence supports the conclusion that the strikers were discharged as soon as they left the plant.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The many unfair labor practices found above, occurring in connection with the Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. OBJECTIONS TO THE ELECTION

It is further clear that the many unfair labor practices engaged in by the Respondent between the time the Union filed the petition on August 19 and election day on December 12 substantially interfered with the laboratory conditions under which elections for a collective-bargaining representative must be conducted. Though some allegations were unsupported by the evidence, the record is clear that the Respondent actively campaigned against the Union and in doing so not only interfered

with employees' freedom of choice but committed many unfair labor practices in the attempt to persuade them.

This was not a case of low-level supervisors merely expressing their opinions and exercising their right to free speech protected by Section 8(c). Rather, this was a situation in which the Respondent hired a campaign consultant to direct the effort of its managers, and supervisors, to participate in the election campaign. Their attempt was to dissuade employees from freely choosing a collective-bargaining representative.

I therefore conclude that the Respondent's acts did have an intimidating effect upon employees and did interfere with their freedom of choice. The election conducted in Case 9-RC-13512 on December 12, 1980, should be set aside.

VI. THE REMEDY

Having concluded that the Respondent has engaged in numerous unfair labor practices and that the objections to the election should be sustained, I shall recommend that the Respondent cease and desist from committing these unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

First, I conclude that the Respondent's many preelection unfair labor practices, rather than an uncoerced change of mind, caused a majority of employees to vote against the Union. These unfair labor practices along with the Respondent's postelection behavior have made conducting a free and fair election in the future an improbability. The Respondent contends that it has now complied with the order of the United States District Court in a companion proceeding under Section 10(j) of the Act, thus employees might reasonably be expected to be able to vote in a rerun election free of coercion and intimidation. I disagree. These unfair labor practices, particularly including the mass discharge of employees for engaging in their fundamental right to strike, cannot be so easily swept aside. The Respondent made its point—it would fight the employees' exercise of statutory rights even by unlawful means. I conclude that the probability of having a rerun election free of the coercive effects of these acts is insubstantial. Finally, the danger of the Respondent's unlawful acts occurring during a rerun election campaign is clear.

The evidence shows that by at least November 9 the Union had 281 valid authorization cards signed by current employees.[18] The number in the bargaining unit as of that date was 497 (the Union did not have a majority when it demanded recognition on August 27 or when it filed the petition for representation on September 19). Evidence of the effect of the Respondent's unfair labor practices prior to the election is that the Union received only 210 votes—a shrinkage in its demonstrated support of about 25 percent, which by any reasonable standard must be considered substantial.

The Union had designations from a majority of employees in the appropriate bargaining unit and the Respondent committed significant unfair labor practices which from the objective evidence here must have had a substantial effect on the employees. And following the election the Respondent continued to commit serious unfair labor practices. Thus, I conclude that traditional remedies would not suffice. A bargaining order should issue. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

In view of this conclusion, whether the Union in fact did make an oral demand for recognition on August 27 is immaterial.[19] I therefore will recommend that the Company be ordered to recognize and bargain with the Union as the designated representative of a majority of its employees in the following bargaining unit effective as of the date the Union obtained a majority, November 9, 1980. *Magnesium Casting Company, Inc., supra.* The bargaining unit is:

> All full time and regular part time production and maintenance employees including shipping, receiving, and warehousing, truckdrivers, MLS control, magazine control, key entry, electronic graphic employees, and production programmers employed by the Respondent at its Louisville, Kentucky, facility, but excluding all office clerical employees, salesmen, and all professional employees, guards, and supervisors as defined in the Act.

I shall also recommend that the Respondent be ordered to reinstate with full backpay Jamie Bibb, Sandra Burress, Nancy Fried, and all employees who went on strike on February 18 and April 20 and 30 (see App. B) to their jobs, or, if those jobs no longer exist, to substantially equivalent positions of employment, without any loss of seniority or other rights and benefits, and make them whole, as well as Jamie Bibb for the suspension and denial of her "birthday," for any losses they may have suffered as a result of the discrimination against them. Backpay will be calculated in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest as provided for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[20]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, R. L. White Company, Inc., Lousville, Kentucky, its officers, agents, successors, and assigns, shall:

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[18] In evidence are 299 cards, but 19 were signed by employees terminated before November 9. One of these, the card of Sandra Burress, is counted, as I conclude she was unlawfully discharged.

[19] I do note that Vice President Peter Pitsinos asked David Grabhorn "[w]hat it was that we wanted," and Grabhorn replied, "Well, what we want is for you to recognize the Union. We want the Union." Although at the time the Union did not in fact represent a majority of employees, his statement could be viewed as a continuing demand for recognition. *Newton Joseph, d/b/a Meat Packers International*, 225 NLRB 294 (1976).

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Interrogating employees because of their interest in or activity on behalf of the Union.

(b) Threatening employees with discharge or discipline because of their interest in or activity on behalf of the Union.

(c) Threatening to close the plant because of employees' interest in or activity on behalf of the Union.

(d) Advising employees of the futility of selecting the Union as their bargaining representative.

(e) Encouraging employees to read antiunion literature.

(f) Soliciting grievances and implying that such grievances would be remedied in order to influence employees against selecting the Union as their bargaining representative.

(g) Making available to employees company T-shirts in order to discourage their interest in or activity on behalf of the Union.

(h) Promising employees benefits in order to discourage their interest in or activity on behalf of the Union.

(i) Threatening employees with loss of benefits in order to influence their interest in or activity on behalf of the Union.

(j) Attempting to ascertain how employees would vote in a Board-conducted election.

(k) Advising employees of the inevitability of strikes in the event they should select the Union as their bargaining representative.

(l) Instructing employees to vote against the Union in a Board-conducted election.

(m) Circulating a petition against the Union for employees to sign.

(n) Urging employees to revoke their authorization cards.

(o) Issuing warnings or other forms of discipline to employees because of their interest in or activity on behalf of the Union.

(p) Discharging, suspending, denying a "birthday," or otherwise discriminating against employees because of their interest in or activity on behalf of the Union.

(q) Discharging employees because they engage in a work stoppage or other concerted activity for their mutual aid and protection.

(r) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[22]

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer full and immediate reinstatement to Jamie Bibb, Sandra Burress, and Nancy Fried, as well as those employees named in Appendix B, and make them, as well as Jamie Bibb for her suspension and denial of a "birthday," whole for any losses they may have suffered as a result of the discrimination against them in accordance with the provisions of the remedy section above.

(b) Recognize and, upon request, bargain with Louisville Printing & Graphic Communications Union Local No. 19, International Printing & Graphic Communications Union, AFL–CIO–CLC, as the exclusive collective-bargaining representative of a majority of the employees in the appropriate bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such agreement in a written signed contract. The appropriate unit is:

> All full time and regular part time production and maintenance employees including shipping, receiving, and warehousing, truckdrivers, MLS control, magazine control, key entry, electronic graphic employees, and production programmers employed by the Respondent at its Louisville, Kentucky, facility, but excluding all office clerical employees, salesmen, and all professional employees, guards, and supervisors as defined in the Act.

(c) Post at its Louisville, Kentucky, facility copies of the attached notice marked "Appendix A."[23] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this Order.

(e) Expunge the warnings given to Kenneth Browning on August 15, 1980; Jamie Bibb on or about September 3, 1980, and January 2, 1981; and Nancy Fried on January 6, 1981, from their personnel records.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election conducted in Case 9–RC–13512 be set aside.

IT IS FURTHER ORDERED that all allegations in the consolidated complaint not found as violations of the Act be, and they hereby are, dismissed.

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[22] Certainly the Respondent's unfair labor practices in this matter are so egregious and demonstrates such proclivity to violate the Act that broad injunctive relief is appropriate. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."